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THE SOUTH AFRICAN SENATE [1]

THE primary purpose of the Senate Act, No. 53 of 1955 (recently declared valid by the South African Appellate Division [2]), was to enable the Nationalist Government to circumvent the entrenched provisions of the South Africa Act, 1909. Taken with its sequel, the South Africa Act Amendment Act, No. 9 of 1956, the effect was virtually to remove the few elements of rigidity that existed in the South African Constitution. An inevitable by-product of this "constitutional" revolution was the radical transformation brought about by the Senate Act, 1955, in the constitution, purpose and stature of the Senate itself. For a thorough appreciation of this far-reaching measure, it is necessary to start with the Senate created in the original South Africa Act.

At the time of Union the four colonies all had bicameral parliaments, but for some of them this was a fairly recent innovation.[3] To small communities an Upper House often appears to be a cumbrous and needlessly expensive luxury. At that juncture, too, Upper Houses tended to be out of favour because the conflict between the Lords and the Commons was looming ahead in the United Kingdom.[4] Among many of the delegates to the National

1 Professor L. M. Thompson has kindly put parts of his important projected publication on *The Unification of South Africa* at my disposal, and I am greatly indebted to him for much of my information. As his book is not yet in print, my citations from it cannot refer to pages. I have also had the benefit of personal discussions with him on many of the problems relating to the Senate.

2 *Collins* v. *Minister of Interior*, 1957 (1) S.A. (A.D.).

3 Until 1893 when responsible government was introduced, Natal had only one chamber (Kennedy and Schlosberg, *The Law and Custom of the South African Constitution* (1935), p. 25. L. M. Thompson, "The Colony of Natal and the Closer Union Movement" in Butterworth's *S. A. Law Review*, 1955, p. 82). The two republics also favoured single chambers, but the Transvaal changed over to two Houses in 1890 (Kennedy and Schlosberg, *op. cit.*, p. 36). The Transvaal second chamber was rather peculiar in character. Called the *Tweede Volksraad*, it was only allowed to legislate upon certain matters, and its measures could be altered by the First Volksraad. On the other hand it had no right of revision or notification of laws passed by the First Volksraad (Law 4 of 1890). The Orange Free State only obtained a second House as a Crown colony in 1907 (*Ibid.*, p. 37). The Cape, however, had two Houses, both directly elected, since the inception of representative government in 1853.

4 Mandelbrote, *Cambridge History of the British Empire*, Vol. 8, p. 681.

Convention there was therefore no great enthusiasm for, and in some individual instances a strong inclination to oppose, bicameralism. Others, however, saw in an Upper House a device for protecting the smaller colonies against the larger,[5] and for watching over the interests of the coloured races, who would not be fully represented in the Lower House. The delegates, however, soon became reconciled to bicameralism and in the result a Senate emerged from the Convention which not only embodied the traditional features usually associated with the Upper House as a house of review and a house of elderly statesmen, but was injected with several elements of federalism, and was to some extent made guardian of the Constitution and watchdog of the unrepresented coloured races. The following features of the Senate bring out these aspects clearly.

1. As a house of elders and review, a higher minimum age was laid down for Senators, *viz.*, thirty,[6] and a property qualification, namely, ownership of immovable property in the Union to the value of £500 over and above any special mortgage,[7] was introduced for elected (but not for nominated) Senators to ensure, no doubt, that those elected would be of the *gens arrivés*. At the same time, the Senate was to some extent to be free from the immediate influence of the mass of the electorate, and an indirect means of election was decided upon.[8] Some of the members were to be nominated by the Government[9] in order to include, it was hoped, "men prominent in the life of the nation who would otherwise be lost to politics,"[10] on the model of the House of Lords. The others were to be elected at the outset by the two Houses of each colonial legislature, and thereafter vacancies were to be filled by election by the Provincial Councils.[11] After ten years election was to be made by an electoral college consisting of members of the Provincial Council and members of the Lower House for each province.[12] All Senators would hold their seats for ten years. Lord Brand has described the composition of the Senate as a compound of the principles of the Canadian and the American Constitutions.[13] The dangers of government control and patronage inherent in nomination were neutralised by a system of indirect election, which at the same time was to serve provincial interests.

2. The system of equal representation for all provinces was adopted by allotting eight members to each of them.[14] This was a great concession by the Cape, then the biggest and most populous colony, in favour of the other colonies, in particular Natal and the

[5] *Cf.* Walton, *The Inner History of the National Convention*, pp. 162–163.
[6] S.A. Act, s. 26 (*a*).
[7] s. 26 (*e*).
[8] See F. S. Malan, *Konvensie-Dagboek*, 1908–1909, p. 61.
[9] s. 24 (i).
[10] Brand, *The Union of South Africa*, p. 64.
[11] s. 24 (iii).
[12] s. 25 (ii).
[13] Brand, *op. cit.*, p. 67.
[14] ss. 24 (iii) and 25 (ii).

Orange Free State, which then and to this day return approximately only one quarter of the number of representatives in the Lower House returned by the two larger provinces. The Convention felt that as Natal had been forced to yield in its opposition to a unitary constitution, equality of provincial interests could be safeguarded in the constitution of the Senate.[15]

3. The Senate was not to be a replica or rival of the Lower House, but was to represent a cross-section of the community on a more equitable basis than is usually secured by the direct election on a single-member constituency basis which had been eventually adopted for the Lower House. It was thought by many delegates that this would ensure greater independence from party politics in the Senate. Accordingly, it was decided that the Senators should be elected for each province on the basis of proportional representation, each voter having one transferable vote.[16] This appears to have been regarded as a matter of fundamental importance and general agreement, and there was little discussion on it at the Convention,[17] though a few delegates seemed to object on the ground of the complexity of the rules inherent in election by proportional representation.[18] Moreover, while on many of the other questions concerning the Senate the final solution adopted was regarded by most as a temporary arrangement, it was expected by all that the matter of proportional representation would remain a permanent feature of the Senate's constitution.[19]

4. At the instance of the President of the Convention, Sir Henry de Villiers (as he then was), who was strongly in favour of giving representation in the Senate to special interests such as the coloured races,[20] an elastic and rather vague formula was adopted providing that half of the eight nominated Senators should be "selected on the ground mainly of their thorough acquaintance, by reason of

15 See Walton, *op. cit.*, pp. 160–161. Thompson, *The Unification of South Africa*, Ch. V, s. 7 (B).

16 s. 134 of S.A. Act.

17 Malan, *op. cit.*, p. 75, says it was adopted without discussion although it was repeatedly mentioned during the Convention, and that practically only one voice was heard against it, that of John X. Merriman, Premier of the Cape. See also Thompson, Chap. 5, s. 7 (B). Prof. Eric Walker relates that the committee charged with making a final draft on the method of election to the Senate put forward a compromise on the theme of proportional representation, to the effect that each province should elect from eight to sixteen members under proportional representation, and that the Governor-General would then choose eight from among them (*Lord de Villiers and his Times*, p. 451). But this proposal was not accepted by the Convention which voted without dividing for election by each province of eight members on a basis of proportional representation (Thompson, *loc. cit.*). The committee's proposal would in practice probably have resulted in the provinces electing only eight members under proportional representation, for if the province elected eight government supporters or more out of the sixteen, the Governor-General might appoint all from the government party. The committee's original proposal would therefore in practice almost certainly have led to the same result as the solution accepted by the Convention.

18 See Brand, *op. cit.*, p. 66.

19 Thompson, *loc. cit.*

20 Malan, *op. cit.*, p. 59.

their official experience, or otherwise, with the reasonable wants and wishes of the coloured races in South Africa." [21]

5. The Senate, not being directly chosen by the electorate, was to be less powerful than the House of Assembly, after the example of the House of Lords. An important convention that had evolved as to the relationship between the Lords and Commons was enacted as part of the South Africa Act, namely, that Money Bills could only originate in the House of Assembly [22]: other provisions on Money Bills were taken over from the Australian Constitution.[23] The Senate could not amend Money Bills; it could only approve or reject.[24] "Tacking on" was prohibited; Appropriation Bills could deal only with appropriation and not other matters.[25] Moreover, although the Senate could revise and delay legislation passed by the Assembly and even reject it, it was not expected to thwart the Assembly. In case of deadlock caused by rejection of a Bill in two successive sessions (one session in the case of Money Bills), a joint sitting of the two Houses could be convened,[26] and a simple majority in the joint sitting could adopt the Bill.[27] In the majority of cases the Assembly because of its larger numbers would carry the joint sitting.

6. The Senate was intended to be a more permanent and stable element of the legislature than the Assembly. The Senate was constituted for ten years as compared with five years in case of the Assembly.[28] It could, after the first ten years, be dissolved simultaneously with the Assembly but not alone.[29] The reason for this latter provision was that the Senate should not be subject to dissolution whenever it rejected a Bill passed by the Assembly, for this would render nugatory the power of delay, which it had under the deadlock clause.[30] At the same time its dissolution in conjunction with the Assembly was probably to ensure that the Senate did not get too out of touch with the Assembly and the electorate. On such dissolution the nominated members would not lose their seats; only the elected members would; the former continued for their full ten years.[31]

7. Although this consideration was probably not in the mind of the framers of the South African Constitution the Senate could in

[21] s. 24 (ii) of the S.A. Act.
[22] s. 60. Such a provision already existed in the Constitution of the Cape Colony.
[23] Thompson, *loc. cit.*, Ch. 5, s. 7 (D).
[24] s. 60. *Cf.* s. 53 of Australian Constitution.
[25] s. 61. *Cf.* s. 53 of Australian Constitution.
[26] s. 63. This only partly followed the Australian Constitution, where before the joint session both Houses had to be dissolved and an election held.
[27] In the Australian Constitution an absolute majority is required.
[28] s. 20 read with s. 25 of S.A. Act.
[29] s. 20.
[30] See *Minutes of Proceedings of National Convention*, p. 54. Merriman had moved that if the Senate rejected the annual Appropriation Bill or a Taxing Bill, it may be dissolved. This motion was negatived by twenty-three votes to seven. See also Malan, *op. cit.*, p. 71.
[31] s. 25.

view of its composition fulfil the role of guardian of the Constitution as was suggested by Mr. Patrick Duncan (who was an adviser at the Convention) about sixteen years later.[32] The fact that the Senate was to represent all sections of the community as well as certain special interests, would make it a more vigilant body for that purpose than the Lower House.[33]

The lack of unanimity on several points, in particular that of equal representation for all provinces in the Senate, led many delegates to regard the Senate as experimental. On the other hand, the experiment was to have a full and fair trial.[34] Some curious provisions were thus laid down in the South Africa Act. The Senate was made indissoluble for the first ten years, except that vacancies could be filled.[35] At the end of that period Parliament "may provide for the manner in which the Senate shall be constituted,"[36] but in the event of this not being done, the Act provided for the future Senate. The composition of the future Senate would be the same as that of the original Senate except that the eight elected Senators for each province were to be chosen by the members of the Provincial Council of that province, and the members of the Assembly elected for such province.[37] These sections manifest another compromise—to make possible the reconstitution of the Senate but with the hope that it would not be undertaken except by general agreement.[38] As Schreiner J.A. said in the *Senate Act* case[39]: "the framers of the Constitution temporised."

But those who hoped for no change were not to be disappointed for many years. Seven years after the Convention, in 1917, a Select Committee of the Senate was appointed to consider how the Senate should be reconstituted, if at all, after the first ten years of its existence. This Committee made a unanimous recommendation that the existing provisions of section 25 of the South Africa Act with regard to the future Senate should be modified, but the suggestions they made preserved several of the main features of the

32 During the Senate Act debate in 1926. *House of Assembly Debates*, 1926, Vol. 7, col. 4217.

33 The final proposal of the drafting committee of the Convention was that the entrenched clauses could be altered by a two-thirds majority of the members of each House, but Gen. Botha then moved that it be a two-thirds majority of both Houses sitting together, and this was immediately agreed to without discussion; Walton, *op. cit.*, pp. 54–55; Malan, *op. cit.*, p. 73. Botha probably thought this would make amendment easier, but he overlooked the fact that the Senate was composed on a special basis. The reasons for his amendment are, however, not indicated in any of the accounts of the Convention.

34 Walton, *op. cit.*, p. 165.

35 s. 24 read with s. 20. The provision making the Senate indissoluble for the first ten years could not be repealed or altered by Parliament during that period (s. 152).

36 s. 25.

37 *Ibid.*

38 Those hoping for a change after ten years were particularly hopeful that the desire for equality of representation of the provinces would disappear by that time. Brand, *op. cit.*, p. 68.

39 *Collins* v. *Minister of the Interior*, 1957 (1) S.A. 552 (A.D.), at p. 571.

original Senate. Equal representation between the provinces was to be continued, and election of Senators was to remain on the basis of proportional representation. The chief changes they suggested were that the nominated element in the Senate be reduced to the four members representing the interests of the coloured population, that election of Senators be by direct election by the electorate on the same franchise as for the House of Assembly but on a basis of proportional representation for each province, and that the Senate powers on Money Bills be increased, and in particular, that it be given the *power of suggestion* in connection with such bills, that is to say, the right to return a Money Bill with suggestions for amendment to the House of Assembly.[40] The general desire, therefore, seemed to be to increase the power of the Senate *vis-à-vis* the House of Assembly, and for the rest to leave its basic features intact. After various debates in both Houses, the Smuts Government in 1920 decided to refer the whole question of reconstituting the Senate to a Conference under the chairmanship of the Speaker (Mr. C. Joel Krige), the Conference to consist of members of both Houses representing all parties. Some of the framers of the original constitution were members of the Conference, namely, F. S. Malan, J. X. Merriman, J. W. Moor, Sir T. W. Smartt. The Conference held ten sittings and its decisions were communicated by the Speaker in the form of a letter to the Prime Minister.[41] The Conference by a large majority (fifteen to six) voted in favour of bicameralism and generally confirmed the resolutions of the 1917 Senate Select Committee. It made certain additional recommendations which were:

(a) That the number of members of the Senate be increased so as to preserve as nearly as possible the ratio of one Senator to three members of the Assembly, as had been decided by the National Convention.[42]

(b) That the four nominated members should hold their seats for the same period as the elected Senators and be, like them, subject to a dissolution.[43]

(c) That in addition to the eight directly elected Senators for each province, the balance be elected, also on a basis of proportional representation, by all the members of the Senate and of the House of Assembly together.[44]

[40] *Senate Select Committee Report*, No. 4 of 1918. The *process of suggestion* originated many years ago in South Australia and spread to other Australian states. (U.G. 65 of 1920, p. 60.) It is also found in the Australian Federal Constitution (s. 53). If the suggestion is not accepted by the Lower House, the Upper House would have to pass the Bill as originally sent from the Lower House, or reject it. It is not a power of amendment.

[41] Published as U.G. 65 of 1920.

[42] The original total of the Assembly was 121 but provision was made in the South Africa Act for it to be increased to 150. See Speaker's Report, § 14.

[43] *Ibid.*, § 15.

[44] *Ibid.*, §§ 19 and 22 (3).

(d) That all Senators hold their seats for seven years instead of ten unless the Senate be sooner dissolved.[45]

(e) That the property qualification required of an elected Senator be discontinued.[46]

For the rest, the Conference wished to retain the provisions of the South Africa Act and reaffirmed that the Senate should not be dissolved alone but only in conjunction with the Assembly.[47] Like the Senate Select Committee, the Conference favoured an increase in the power of the Senate which was to be achieved mainly by the system of direct election on a basis of proportional representation, each province to be a single electoral area. Its hope was also that a body so composed would be less amenable to packing by the party managers than was possible under the system of the South Africa Act.[48] The support for proportional representation was particularly strong,[49] the purpose being to ensure a Senate largely independent of the Government and the Assembly and to promote the election of the best men whose services were available.[50]

None of these recommendations was ever implemented. The main objection was to the proposal that the Senate should be elected by the people, a suggestion which had been expressly rejected by the National Convention of 1909. The Government of the day under General Smuts decided not to go on with the scheme of the Speaker's Conference, considering that it would make the Senate too strong a body.[51] No one pressed strongly for acceptance of the recommendations; there seemed to be general satisfaction with the existing Senate.[51a] In the result, the future Senate prescribed by the

[45] *Ibid.*, § 22 (4) and § 23.

[46] *Ibid.*, § 28. The main reason for this proposal was that the requirement was regarded as undemocratic and that it was not found in all the other Dominions.

[47] *Ibid.*, § 23.

[48] See U.G. 65–20, pp. 82–83 (memorandum by O. Clough, Clerk of the Senate).

[49] *Ibid.*, § 18. The voting was twelve to five in favour. U.G. 65–20, p. 29.

[50] Memorandum quoted, note 47, p. 85.

[51] See statement by General Smuts (as Leader of the Opposition) in the Senate Act debate of 1926. *Assembly Debates*, 1926, col. 4563. No Hansard reports were printed in South Africa during the years 1916 to 1923, but in the typewritten reports of the Senate debates, Smuts (then Prime Minister) in a debate on May 15, 1922, is reported as saying that direct election of Senators was an impossible proposition. An elected Second Chamber, no doubt, would demand greater powers, particularly over Money Bills. See note in *Journal of Comparative Legislation*, Vol. 5 (1923), pp. 134–135.

[51a] The absence of Hansard reports at this period has made it difficult to trace the reaction to the Speaker's Conference Report. In the Assembly not even written or typewritten reports of debates were kept. According to the *Cape Times* of May 21, 1921, Smuts made a statement in the Assembly that the Conference was a very valuable report but that after dissolution of the Assembly and Senate in October, 1920, the general election which followed early in 1921 had brought in a Senate under the existing s. 25 which must be regarded as a good body. (This Senate gave him a comfortable majority.) There were too many items, he said, in the Report that were most contentious, and the government would not implement the Report. No further debates followed in the Assembly. In the Senate (according to the typewritten reports) Senator Stuart, a nominated Senator, moved on May 15, 1922, that the Report be implemented. He found it difficult to find a seconder, and Senator Whiteside, who eventually

South Africa Act automatically came into being. As already seen, this body did not differ materially from that inaugurated with Union.

The experience of the first ten years was that the Senate fulfilled the objects for which it was constituted. It was not a strong Senate, but came to consist of men of substance and of mature age, and fulfilled its role as contemplated by the National Convention. During this period no disagreement upon any important question occurred,[52] though this was also due to the fact that the Senate, contrary to the intention of its framers, had come to be constituted on party lines, and casual vacancies were nearly all filled from party ranks.[53] After 1920, the party character of the Senate became more pronounced because the electoral colleges were now even more party political in composition.[54] In practice the elections were rigidly controlled by the party caucus.[55] Nevertheless, some members particularly those nominated to represent the coloured races frequently voted against the Government.[56]

In the 1924 election a coalition of the Nationalist Party and the Labour Party (the Pact Government) defeated the Smuts South African Party, and the new Government faced a Senate which had not been dissolved simultaneously with the Assembly and in which the new Government therefore had a minority. According to section 20 of the South Africa Act this Senate would remain for another five years unless the Assembly was also dissolved. In 1925 the Senate rejected the Mine and Works Amendment Bill (known as the Colour Bar Bill), which was only passed by joint session under section 63 in the 1926 session.[57] An Electoral Bill of 1925 led to a disagreement between the two Houses and it only became law in the following session, though without having to use the machinery of a joint sitting.[58] There was a deadlock on the Flag Bill, but this was later settled by agreement.[59] The Senate also failed to pass the Precious Stones Bill in 1925. But perhaps the greatest bone of contention was over the number of

supported him, spoke in favour of only one House elected by proportional representation. Only a few Senators took part in the debate, and Smuts stated that the country was satisfied with the existing Senate (see also note 51). The motion was defeated by 20 votes to 12 and thereafter the matter was never again raised in the Senate or the Assembly.

52 See memorandum in U.G. 65–20, p. 27.

53 Casual vacancies for the first ten years were filled by election by members of the Provincial Councils, which also assumed a party complexion contrary to the intentions of the National Convention. In fact, a Council usually selected one of its members to a vacant Senatorship. U.G. 65–20, p. 79.

54 *i.e.*, Provincial Councillors plus members of the Assembly for the province.

55 See Mandelbrote, *op. cit.*, p. 675.

56 *e.g.*, W. P. Schreiner. Mandelbrote, *op. cit.*, p. 681.

57 See Kilpin, *Parliamentary Procedure* (2nd ed.), p. 133. Verloren van Themaat, *Staatsreg*, p. 298. The Bill became Act 25 of 1926.

58 Kilpin, *ibid.*, *in notis*.

59 Mandelbrote, *op. cit.*, p. 683. Kilpin, *op. cit.*, p. 134.

amendments moved and passed in the Senate. In one case the Minister of Justice (Tielman Roos) withdrew a Bill.[60]

Although the Opposition claimed that the Senate was merely fulfilling its role as a House of revision and reconsideration in these Bills,[61] the Pact Government wished to reform the Senate but in a manner quite different from that suggested by the Speaker's Conference of 1920. It secured the passage of the Senate Act, 1926. This Act [62] gave the Governor-General power to dissolve the Senate within 120 days of "any dissolution of the House of Assembly." This provision was introduced as an exception to section 20 of the South Africa Act which prohibited dissolution of the Senate alone and which was not being repealed. The object was to give a newly elected government the opportunity to change the party make-up of the Senate in its favour without the risk of a completely fresh election of members of the Assembly.[63] The time limit of 120 days was imposed by the Government as a gesture of fairness.[64] A further clause of the 1926 Act altered the provision of the South Africa Act that government-nominated members did not lose their seats on dissolution. In addition it was laid down that they would vacate their seats whenever there was a change of government, even though the whole Senate was not dissolved.[65] The latter provision was designed to give a new Government a working majority, if possible, without dissolving the Senate.[66]

The effect of the 1926 Act was to increase the party complexion of the Senate and to ensure a majority in it for the Government

60 The Immorality Bill of 1926 punishing extra-marital intercourse between European and African was withdrawn after the committee stage in the Senate. See *Senate Debates*, 1926, cols. 435–436. It only came on to the Statute-book in the next session

61 Thus it was stated that in rejecting the Colour Bar Bill the members nominated to represent the interests of the coloured races did no more than their duty. See speech of Mr. Joel Krige (then ex-Speaker) in *Assembly Debates*, 1926, col. 3936.

62 For a copy of the Act and a commentary, see Kennedy and Schlosberg, *op. cit.*, pp. 245–247; May, 2nd ed., of above, pp. 178–180.

63 As required by s. 20. At the same time, of course, it gave a retiring government the option not to dissolve the Senate when dissolving the Assembly, because it knew that if it was returned after the election, it could then decide whether it was worth dissolving the Senate. Indeed, the Act as it stands gives such a government two chances. Even if it has dissolved the Senate before the election, it may, within 120 days after the election, again dissolve the Senate. This may be useful if there has been a favourable swing at a Provincial council election in the interim. In the debate in the Assembly, the Prime Minister thought the latter power should apply only to the case where the Assembly has been dissolved alone, but this does not appear in the Act. See *Assembly Debates*, 1926, col. 4390.

64 Indeed, there was no dissolution of the Senate under this Act till after the general election of the Assembly in 1929. Kennedy and Schlosberg, *op. cit.*, p. 248. In the meantime two further Acts had to be passed by joint sittings under s. 63, the Precious Stones Act of 1927 (which had been rejected in 1925—see text above) and the Iron and Steel Industry Act in 1928. In both cases the Senate had made amendments which the Assembly would not accept. Kilpin, *op. cit.*, p. 133; Van Themaat, *op. cit.*, p. 298.

65 Subject to these two new clauses, nominated Senators still held office for ten years. So, indeed, did elected Senators.

66 See Kennedy and Schlosberg, *op. cit.*, p. 247; May, *op. cit.*, p. 179.

of the day.[67] It would, however, still give substantial representation to the minority as election continued to be by proportional representation by the electoral colleges of the provinces. Perhaps its most undesirable by-product was that it would ensure the nomination by the Government of eight Senators who would simply be Government faithfuls,[68] whereas the National Convention had intended nominated Senators to be men of substance and independent judgment. Also the group of four members nominated to represent the interests of the coloured races now came to consist of men who supported the non-European policy of the Government of the day.[69] Indeed, in some cases knowledge of and interest in the problems of the coloureds were hardly considered as relevant for appointment.[70] Nevertheless, after 1926 the Senate became increasingly the body in which non-European interests were to be represented. When the Africans in the Cape were deprived of their franchise on the common roll in 1936, it was at the same time enacted that four Europeans would be elected by Africans to represent them in the Senate, and for this purpose the Union was divided into four constituencies.[71] Such Senators are elected for five years and do not vacate their seats on dissolution of the Senate.[72] In 1946 provision was made for two European Senators to represent Indians in the provinces of Natal and Transvaal; one was to be nominated by the Governor-General on the ground of his acquaintance with the wants and wishes of Indians, the other to be elected by Indian voters on a separate roll.[73] Owing to non-co-operation from the Indians these provisions of the Act were not

[67] In the Bill submitted to the Assembly there was also a clause to alter s. 63 (the deadlock clause) of the S.A. Act. It provided that if the Senate reject a Bill, then if the Assembly passes it in the next session, it became law. The necessity of a joint sitting would thus be eliminated. This clause was, however, dropped by the Government in the Senate as the Opposition majority there had shown an attitude of compromise on the Bill. *Senate Debates*, 1926, cols. 1202, 1260: also *Assembly Debates*, 1926, cols. 4215 *et seq.*

[68] This trend was already evident before 1926, but the Act intensified it.

[69] Kennedy and Schlosberg, *op. cit.*, p. 247.

[70] The classic instance occurred under the Hertzog-Smuts United Party Government. A cabinet minister who was not returned to the Assembly at the election in 1938 was nominated to fill a vacancy in the Senate to represent the interests of the coloured races. Two other ministers resigned from the Government because they considered him unqualified for such nomination and objected to such an appointment on constitutional grounds. May, *op. cit.*, 3rd ed., p. 89.

[71] Representation of Natives Act, 1936 (passed by two-thirds majority of both Houses sitting together in terms of ss. 35 and 152 of the South Africa Act). For method of election see May, *op. cit.*, Chap. 15. These seats in the Senate were in addition to the three seats in the Assembly created by the Act for Native voters in the Cape no longer on the common roll. May, 3rd ed., pp. 101 *et seq.*

[72] These Senators had the same rights and privileges as well as duties as other Senators except that they could not form part of the electoral colleges for election of Senators.

[73] Asiatic Land Tenure and Indian Representation Act, 1946. This was to compensate for removal by the Act of the limited franchise Indians had in Natal. At the time there were two Indians on the common roll in Natal. The disenfranchisement was probably in conflict with sections 35 and 152 of the S.A. Act which required a two-thirds majority of both Houses, but the

given effect to, and they were subsequently abolished by the Nationalist Government which came into power in 1948.[74] When the mandated territory of South West Africa was given representation in the Union Parliament, in 1949,[75] four additional Senators (Europeans) were provided for, two to be elected on a basis of proportional representation by an electoral college of South West Africa[76] and two to be nominated by the Governor-General, one of them according to the formula that he be acquainted with the reasonable wishes and wants of the coloured races of the territory. They all hold office for ten years, have full rights in the Senate and are subject to the provisions of the Senate Act, 1926.

At the time of the enactment of the Senate Act, 1955, the Union Senate therefore consisted of forty-eight members.

As the paramount aim of the 1955 Act was to give the Government the necessary majority for purposes of the entrenched clauses, the pattern for the Senate established by it was bound to verge on the arbitrary, and the grounds on which particular features were introduced are not clear. When introducing the Bill in the House of Assembly, the Minister of the Interior, Dr. Dönges, did attempt to justify some of the changes, but did not give a positive basis for the new composition of the Senate. The Senate in session at the time of the Act[77] would be dissolved by proclamation by the Governor-General, and all sitting members would thereupon immediately vacate their seats.[78] The new Senate was to be composed as follows:

1. The number of nominated Senators would be doubled from eight to sixteen,[79] and eight of them were to be selected on the ground of their acquaintance with the reasonable wants of the coloured races.[80] As already seen, this qualification would not prevent the nominees being supporters of the Government native policy.

2. The number of elected Senators was increased by giving each province a representation of one-fifth of the total number of members of Parliament and members of the Provincial Council,[81] no province to have less than eight Senators. According to the present delimitation the Cape becomes entitled to twenty-two

Act was only to come into operation by proclamation and no such proclamation was ever issued. See *Harris* v. *Minister of the Interior*, 1952 (2) S.A. 428 (A.D.), at p. 472.

74 Act 47 of 1948. See May, *op. cit.*, 2nd ed., pp. 129–130 and 369. May, 3rd ed., p. 85, n. 15.

75 S.W.A. Affairs Amendment Act, No. 23 of 1949, s. 30. See May, 3rd ed., p. 85.

76 The college consists of members of the Legislative Assembly of South West Africa and the members of the Union Assembly elected by the territory.

77 A copy of the Act is given as Appendix 52 in May, *op. cit.*, 3rd ed., pp. 642–647.

78 s. 1. Senators elected under the Native Representation Act, 1936, were not, however, affected. See below.

79 s. 2 (1) (*a*).

80 s. 3 (2).

81 For the relevant figures, see May, 3rd ed., p. 86.

Senators, Transvaal twenty-seven, and the other two provinces to eight each. No indication is given as to why the fraction of one-fifth was taken, but it is possibly due to the fact that such a fraction gave each of the two smaller provinces approximately its minimum of eight Senators. This provision does away with the equal representation which each province had enjoyed since Union, thus removing one of the protective devices introduced for the smaller provinces.

3. The electoral colleges for elected Senators continue to be as before [82] but election will now be by "majority vote each voter having one non-transferable vote for each Senator to be elected." [83] That means that election will take place by means of a bulk vote and would give the majority party in the province all the seats in the Senate for that particular province. This provision did away with one of the most fundamental features of the Senate, that of election by proportional representation,[84] and furthermore completely eliminated Senate representation of the minority in a particular province. The new system of election makes the Senate quite unrepresentative of the political strength in the country. A direct majority vote can only reflect the strength of political parties if there is a reasonably large number of constituencies, but not if there is a single large constituency such as the provinces of South Africa. In order to get any representation a party must win a majority of the parliamentary and Provincial Council seats in the province. The new system also ensures that in most cases the majority party in the Assembly gets a vast and disproportionate majority in the Senate,[85] except where the opposition parties have the majority of parliamentary and Provincial Council seats in one of the larger provinces.

4. South West Africa retained its two nominated Senators and its two elected Senators, but the latter were now similarly to be elected by direct majority vote of the South West Africa electoral college instead of by proportional representation.[86]

5. The position of Senators elected to represent Africans under the Native Representation Act is not affected at all by the Act.

[82] *i.e.*, members of the Provincial Council plus members of the Assembly for that province. s. 2 (2).

[83] s. 4 (3).

[84] The only reasons given for this change by the Minister introducing the Bill were that at the National Convention proportional representation was rejected for elections of the *Assembly*, and that at the Speaker's Conference of 1920 two persons who had been members of the National Convention voted against proportional representation for the Senate. *Assembly Debates*, 1957, cols. 6009–6011. Note that voting by proportional representation for the new Senate is retained where there is a tie after an election by direct majority vote, and if there is still a tie, the election is decided by the drawing of lots. s. 4 (4).

[85] In the first election under the new Act, the Government (National Party) which had a majority of twenty-nine in the Assembly obtained fifty-seven Senators for the provinces (twenty-seven for Transvaal, twenty-two for the Cape Province, eight for the Orange Free State) and the main Opposition (United Party) only eight for Natal. With the addition of sixteen nominated Senators and four Senators for South West Africa, the Government had seventy-seven seats in the Senate, as against twelve of the Opposition (8 U.P. for Natal, and four representatives elected by Natives). See May, *op. cit.*, 3rd ed., p. 74.

[86] s. 10 (*b*).

Neither did they lose their seats when the dissolution of the previous Senate was enforced by this Act.[87]

The above modifications were introduced in order to achieve the necessary majority for purposes of the entrenched clauses. Other changes were, however, made by the Senate Act.

(a) The property qualification of £500 laid down by the South Africa Act was dispensed with.[88] The reason given by the Government for this change was that it was recommended by the Speaker's Conference of 1920, but the Opposition alleged that it was to make room for party organisers in the Senate.[89]

(b) The duration of the Senate was reduced from ten to five years, and every Senator, nominated or elected, will hold his seat for five years.[90] Again, the reason given for the change was that the Speaker's Conference had suggested seven years.[91] The change was bound to bring the Senate into closer alignment with the Assembly.

(c) Except in relation to the above, the Senate Act, 1926, was otherwise retained, but additional power was given for the Senate to be dissolved within 120 days from the expiry of the term of office of a Provincial Council.[92]

(d) During the second reading debate on the Bill in the House of Assembly, members of the Opposition showed that under this Bill a new government which had obtained a majority in the House of Assembly might still be in a substantial minority in the Senate, even if advantage were taken of the power of dissolution of the Senate under the 1926 Act.[93] Accordingly, the power to dissolve after expiry of the term of a Provincial Council, referred to above,[94] was introduced but in addition a section was inserted repealing the deadlock clause (s. 63) of the South Africa Act, and substituting a section similar to the provisions of the Parliament Act, 1911, of the United Kingdom. It is now provided that if the Senate rejects or fails to pass a Bill passed by the Assembly in two successive sections, such Bill may be presented for the Governor-General's assent and shall become an Act of Parliament without the approval

87 ss. 1 (1) (*b*) and 2 (2). See note 78, *supra*.

88 s. 5.

89 See *Assembly Debates*, 1955, cols. 6006–6007.

90 ss. 3 (1), 4 (1), 9 and 10 (*a*). If the seat of a Senator becomes vacant, the successor will hold the seat until completion of the period of his predecessor. ss. 3 (3) and 4 (2).

91 See *Assembly Debates*, 1955, col. 6007.

92 s. 1 (2). The Senate Act, 1926 (see above) provided only for dissolution of the Senate within 120 days of dissolution of the *Assembly*. See note 94, *infra*.

93 For example, where the new Government gets an overall majority in the Union without getting a majority in the two larger provinces. See examples given by Mr. Eaton and Mr. Lovell, *Assembly Debates*, 1955, cols. 6275 and 6334. In such a case it might not even get a majority in a joint sitting of the two Houses.

94 Even if the new Government after a general election obtained a majority in the Assembly in the larger provinces, it might still have a minority in the Senate, if the Provincial Councils remain constituted as they were before the election. Normally, Provincial Councils dissolve a year after a general election for the Assembly. See example by May, *op. cit.*, 3rd ed., p. 77 and van Themaat, *op. cit.*, p. 269, n. 23.

of the Senate. In the case of a Money Bill, rejection by the Senate in one session will permit the Bill to become law.[95]

It can be seen, therefore, that the new Senate Act which was strongly opposed by the non-Government parties has completely transformed the face of the Senate. The Senate has in one fell swoop been increased in number from forty-eight to eighty-nine, and now stands in a ratio of one to two to the Assembly instead of the previous one to three. The Act eliminated equal provincial representation as well as election by proportional representation. It made the Senate of shorter duration and more readily subject to dissolution by the Government in power. The Senate has more than ever ceased to be composed of mature and independent men who could provide a more stable and permanent element in the legislature. In its new composition it is also bound in most cases to give the Government an unreal majority out of all proportion to its majority in the Assembly, and virtually to eliminate the Opposition.[96] The Act has thus rapidly intensified the party complexion of the Senate, so that today it is a pale reflex, a mere registering machine of the House of Assembly. From such a body little can be expected in the way of revision and checking of hasty legislation, let alone of acting as guardian of the constitution. All the features introduced by the National Convention have gone except the minimum age limit of thirty, and it is small consolation to be told that the Act merely brought to a logical conclusion the general trend already evident in the Senate during its first forty-five years.[97] The fact remains that despite its composition on party lines, the Senate for the whole of that period gave opportunity for, and often ensured, expression of the hopes of the framers of the Constitution and gave fair representation to the minority. Perhaps the only element that has now achieved greater strength and importance in the Senate is the representation of the coloured races. With the official Opposition strongly diminished in numbers the elected native representatives have felt a greater need than before to step into the breach.[98] But that apart, there is already evidence that the Senate will in the normal course of things become the applauding gallery of the government in power, like the Senate of the Roman Principate which, having been enlarged and strengthened by the emperors in the first instance, rapidly became their echo and was soon eclipsed. Many Government spokesmen

[95] s. 7 of Senate Act, 1955, substituted a new s. 63 of S.A. Act.

[96] See note 85, *supra*. The only exceptions would be where the Opposition obtains an electoral college majority in one or both of the larger provinces.

[97] See van Themaat, *op. cit.*, p. 270.

[98] See remarks of May, *op. cit.*, 3rd ed., pp. 107–109. Of course, the Senators nominated to represent the interests of the coloured races have for some years simply represented the official government view. With a return to more normal policies, it is possible, however, that the nominated element will regain its true role. It is interesting to note that under the Separate Representation of Voters Act, 1951 (originally declared invalid by the court and now revalidated —see Act 9 of 1956), an additional European Senator is to be nominated on grounds of his acquaintance with the reasonable wants of the Cape coloured community (s. 7), thus raising the number of the Senate to ninety.

have admitted that the Act goes much further than they would have liked (see Dr. Dönges, Minister of Interior, *Assembly Debates*, 1955, col. 6015) but, nevertheless, the most recent announcement is that the new Senate will stay. To some circles, no doubt, nothing would be more desirable, and one can expect the cry for unicameralism to make itself heard more in the Union. There is not place here to pursue the argument of bicameralism against unicameralism except to say that it would be against the tradition of many years, enshrined by the South Africa Act and reinforced by the Speaker's Conference of 1920, to abolish the Senate. Whether a single chamber legislature is legally feasible under the South African constitution is another matter, which requires separate discussion.

POSTSCRIPT

Since going to Press, a scheme for reform of the Senate has been announced by the United Party, the chief Opposition party, as part of its programme for the 1958 general election. The full text has not been released and the account which follows is based on newspaper reports of the statements of United Party spokesmen. The scheme is rather involved, and apparently has not yet been finally worked out. It is proposed to increase the number of representatives elected by Africans from the present four to six white Senators and to introduce six elected white representatives for the Cape coloured, at the same time doing away with the present system of Senators nominated by the government on the ground of their special knowledge of the wishes and wants of the non-Europeans. The four provinces will each elect eight Senators as in the pre-1955 Senate, and there will be eight Senators nominated by the government. The number of Senators for South West Africa will be reduced from four to two who will be elected. Provincial and S.W.A. Senators will be chosen directly by the electorate of each province (instead of the present electoral colleges) on the basis of proportional representation. Ordinary legislation will have to be passed not only by a majority of the Senate, but also by a majority of Senators representing the white electorate (including the nominated Senators), thus introducing a white veto. Legislation on certain constitutional matters which are as yet unspecified but which will include the franchise will require a two-thirds majority of elected Senators (excluding the nominated Senators). This has been described by United Party spokesmen as providing a *de facto* entrenchment in constitutional matters, but it is difficult to see how such an entrenchment as well as the white veto will be legally feasible under the present virtually completely flexible South African constitution.

The scheme appears to have a three-fold purpose. Firstly, to reverse the present trend of affairs in respect of the Senate and to restore its prestige. A return to some of the pre-1955 features

such as equal provincial representation of the provinces and reduction of the S.W.A. representation is therefore proposed. The direct election of Senators provided in the scheme is an innovation. It will no doubt increase the influence of the Senate and might even make it a serious rival of the Lower House, as was feared by some members of the National Convention and was typified by the reaction of General Smuts to the recommendation of the Speaker's Conference of 1920 in favour of direct election (see note 51 above). Such election of Senators on the basis of proportional representation may mean that like the United States senator, a South African senator can afford to think in far wider terms than the average member of the Assembly elected on a constituency basis and be relatively free of the party managers—see note 48 above. There is here a distinct possibility that the proposed Senate may become more than a house of review and check on hasty legislation. Moreover, the presence of twelve Senators representing non-whites will serve to rivet the attention of the electorate on the Senate perhaps more than the Assembly, where the non-white representation will be much smaller.

The second purpose seems to be to use the Senate to meet non-white demands for better representation in Parliament. This will continue the tradition that started in 1936 with the election of representatives for Africans.

Thirdly, there is a clear purpose to increase substantially the role of the Senate as a guardian of the constitution. Even assuming that the two-thirds majority proposal provides no constitutional guarantee from a legal point of view, the presence of twelve elected representatives of non-whites constituting approximately a quarter of the total membership of the House will, provided some white co-operation is forthcoming as has been the position to date, help a great deal towards safeguarding the interests of the non-whites, particularly in protected constitutional issues. A large proportion of the white electorate and of its representatives has to date shown some regard for protection of guaranteed constitutional rights. *Die Burger*, September 17, 1957, has pointed out that a two-thirds majority excluding nominated Senators would entail a vote of Senators representing sixty-six per cent. of the white electorate, and thus provide what is virtually a black veto in constitutional matters.

The main criticism by the present government of the scheme has been based on the ground that the scheme will make it difficult for a government with a majority in the Assembly to command a majority in the Senate. On the basis of present political divisions in the Union, direct election by proportional representation will return a more or less evenly balanced number of the two main political parties, and even with the power to nominate Senators, a government might have to seek the support, or at least the acquiescence, of the Senators representing the non-Europeans. Indeed, it

has been said that the scheme provides for a coalition of the United Party and non-white representatives against the Nationalists, the present government party (*Die Burger*, September 18, 1957). The United Party, however, announced subsequently that it would restore the system of joint sittings which existed before 1955, but that a joint sitting would not be competent in those constitutional matters which are to be entrenched. Certainly under the scheme a government which has not the confidence of the non-whites might find governing a little awkward and might have to resort frequently to joint sittings, as the Pact government was forced to do in several instances between 1924 and 1929 (see above). But government, though more impeded, will not necessarily be impossible (*cf.* the House of Lords parallel and see s. 7 of the Senate Act, 1955—see notes 93–95 above). It may be the price that has to be paid in order to give the non-white a greater voice in the government of the country.

Another criticism of the Nationalist Party is that the nominated Senators would be half-Senators in that they will not have a vote on protected constitutional matters, but this is a matter which could easily be straightened out. My own criticisms of the scheme would be directed against the unnecessary and undesirable white veto, which together with the rather tardy and inadequate recognition of African representation in Parliament, the exclusion of Indian representation, and the prohibition of non-white members of the Senate, makes the scheme largely unacceptable to non-white opinion. (It should be noted, however, that the United Party proposes to restore the Cape coloured franchise though with higher electoral qualifications.) But these, apart from the white veto are political considerations. From a constitutional point of view, leaving aside the question of the legal efficacy of the proposed entrenchments, the scheme would enhance the stature of the Senate. Such a Senate would compel attention in every respect of its activities, and most probably attract Senators of ability and distinction. It would be more than a house of review; it could serve as a vital check upon the despotic tendencies and unrepresentative actions of any government. It may well be that such a Senate, though only a small forward step in political development, is what the Union needs under present conditions to restore confidence, and provide some attempt to protect minority interests. And rigidity in the South African constitution is no doubt urgently necessary. Several aspects of the scheme, however, and in particular the proposed system of entrenchment, need closer investigation and more precise formulation, others such as the white veto need complete revision. Above all, this scheme should be regarded as a step to regain and protect past achievements, not as the complete answer to future constitutional and political developments.

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RECENT DEVELOPMENTS IN NULLITY JURISDICTION

The decision of the Court of Appeal in *Ramsay-Fairfax* v. *Ramsay-Fairfax* [1] and the Report of the Royal Commission on Marriage and Divorce [2] appear to call for a re-examination of the vexed question of jurisdiction in nullity in the conflict of laws. The present article is not intended as a commentary on the Report and the Draft Code (Jurisdiction and Recognition [3]) appended to it; its object is rather to consider some of the main proposals in relation to the problem as a whole.

Distinction Between Void and Voidable Marriages

The Code proceeds on the assumption that a distinction must be made between void and voidable marriages for the purpose of defining jurisdiction. This distinction was not drawn by the ecclesiastical courts the competence of which was in all cases determined by the residence of the respondent.[4] It was the judgment of Bateson J. in *Inverclyde* v. *Inverclyde* [5] which first imported it into the field of private international law. The learned judge thought that the difference between suits for the annulment of a voidable (as opposed to a void) marriage and suits for the dissolution of a valid marriage was merely one of form and that in both jurisdiction should be confined to the court of the domicile. This reasoning was rejected in two undefended cases decided in 1944, *Easterbrook* v. *Easterbrook* [6] and *Hutter* v. *Hutter*,[7] and in 1956 in the most recent decision of the Court of Appeal on the subject, *Ramsay-Fairfax*.[8] In all of them the facts were similar; the residence of the parties was in England though their domicile was abroad, and the marriages were challenged on the ground of wilful refusal to consummate. The similarity between voidable marriages and those open to dissolution is especially close in the case of wilful refusal, and yet in all of these decisions the court assumed jurisdiction on the basis of residence, refusing to draw any

1 [1956] P. 115.
2 Cmd. 9678 (1956). Hereinafter referred to as "Report."
3 Appendix IV. Hereinafter referred to as "Code." It should be noted that whilst the Report and the Code apply to both England and Scotland, this paper is written with reference to England alone. For a general account of the Report, see W. Latey, (1956) 5 I.C.L.Q. 499.
4 *Infra*, p. 577.
5 [1931] P. 29.
6 [1944] P. 10.
7 [1944] P. 95.
8 *Supra*, n. 1, affirming Willmer J. [1955] 3 W.L.R. 188; [1956] P. 115.

distinction between void and voidable marriages.[9] In *Ramsay-Fairfax* Denning L.J. observed: "However valid this distinction may be for some purposes, it is not valid for our present purposes."[10] He was further "clearly of opinion" that *Easterbrook* and *Hutter* were rightly decided and that *Inverclyde* should be overruled.[11] But the ghost of *Inverclyde* was not yet laid. A bare few months after the Court of Appeal's decision the Royal Commission published its Report, which once again reverted to the reasoning of Bateson J.

The development of the law in this field shows a disconcerting instability. The present chance for a statutory restatement in an intelligible form must, therefore, not be missed. What is somewhat surprising is that whilst the Royal Commission recommended that wilful refusal should be made a ground of divorce and not of nullity (and few will quarrel with the merit of this proposal[12]), it still found it necessary, notwithstanding the decision of the court in *Ramsay-Fairfax*, to maintain the distinction between void and voidable marriages for the purpose of defining jurisdiction. It must be urged that the proposed retention of the distinction is unfortunate. The Report is not very informative as to the reasons which led the Commission to its decision; these have to be extracted from the following two passages: "In its effect on the personal status of the spouses the annulment of a voidable marriage has the same effect as the dissolution of a valid marriage. It follows, in our opinion, that the jurisdiction of the court in respect of proceedings to annul a voidable marriage should be governed as far as possible by rules similar to those which regulate the divorce jurisdiction of the court."[13]

"It is well established that any member of the public in his dealings with the parties to a void marriage may rely upon its nullity without the necessity of a judicial decree."[14]

[9] It should be noted that the Court of Appeal in *De Reneville* v. *De Reneville* [1948] P. 100 approved of the importation of the distinction into private international law but for such very different reasons as to constitute an entirely new departure. *De Reneville*, just as *Inverclyde*, represents a sharp turning on the graph of this branch of the law. See *infra*, p. 574. In *Casey* v. *Casey* [1949] P. 420, however, the Court of Appeal reiterated its approval of the distinction in words and for purposes which were much nearer to *Inverclyde* than was the case in *De Reneville*.

[10] *Supra*, n. 1, at p. 133. The distinction is not to be found in the Matrimonial Causes Act, 1950.

[11] *Supra*, n. 1, at p. 134. Denning L.J. also added, at p. 134: "It would be very wrong to suggest now that these decisions were bad, and that people who acted on them have been guilty of bigamy." With respect, it is a little difficult to imagine that a charge of bigamy would be preferred in such circumstances against the parties themselves who have married on the strength of the decree. As to others, they could have hardly "regulated their affairs on the basis" (*ibid.*) of these cases without a decree, the marriage in question being voidable. And is it not wrong to tolerate a state of affairs as a result of which in other countries the persons involved in the English suit may be prosecuted for bigamy if they subsequently marry?

[12] But see *Ramsay-Fairfax*, *supra*, n. 1, at pp. 132–133, *per* Denning L.J.

[13] Report, para. 892.

[14] Report, para. 882.

The differences between the voidable and void marriage in domestic law were never very great owing to the retrospective effect of a decree in the case of a voidable marriage.[15] It is, however, usually said that a marriage which is void is a complete nullity from the beginning without any adjudication by the court.[16] A marriage that is voidable is, on the other hand, valid until it is judicially annulled. It is submitted that the chief weakness of Bateson J.'s judgment, and now of the Report, is to attach an undue importance to this one supposedly outstanding feature of the distinction. The learned judge thought that only in the case of a voidable marriage a decree changes status, and for this reason the competence to pronounce it must be restricted to the courts of the domicile. Many writers seized upon this difference. "A decree annulling a voidable marriage changes status, a decree annulling a void marriage declares it."[17] Yet in *Salvesen* v. *Administrator of Austrian Property*[18] the opposite view is taken by all members of the court. Indeed, if the substance of the matter is examined, the decree always touches and concerns the domestic relations of the parties. They can only be sure of their position by resorting to a court, and the decree, whether the marriage is void or voidable, has a great practical value to the woman.[19] The court in both cases determines, whatever the legal theory may be, whether the persons concerned are man and wife, whether they are married or unmarried.[20] The difference is one of degree rather than of kind, of form rather than of substance.[21]

A further objection should be voiced. There are no very obvious reasons why the distinction should become permanently incorporated into English private international law at a time when it is fast disappearing in Continental countries. A learned writer has shown how isolated and out of step English law is in this respect. "In modern times and in modern law a void marriage is no longer simply of no effect."[22] More than this—it is no longer

[15] The distinction itself arose when the common law courts prohibited the ecclesiastical court from bastardising the issue of a voidable marriage after the death of one of the spouses. See F. H. Newark, (1945) 8 M.L.R. 203. It is and always has been unknown to canon law.

[16] *De Reneville*, *supra*, n. 9, at p. 111, *per* Lord Greene M.R.

[17] R. H. Graveson, (1948) 12 Conv.(N.S.) 185; G. C. Cheshire, *Private International Law*, 5th ed. (1957), p. 350; and J. Jackson, *The Formation and Annulment of Marriage* (1951), p. 61.

[18] [1927] A.C. 641.

[19] Jackson, *op. cit.*, p. 67.

[20] M. Wolff, *Private International Law*, 2nd ed. (1950), pp. 78 *et seq.*; J. H. C. Morris, *Cases on Private International Law*, 2nd ed. (1951), p. 181; Dicey, *A Digest of the Laws of England with Reference to the Conflict of Laws*, 6th ed. (1949), p. 154.

[21] A recent writer has even argued that the decree of nullity in voidable marriages is unnecessary: Newark, *op. cit.*

[22] E. J. Cohn, (1948) 64 L.Q.R. 533. There is also a distinct tendency in some countries, *e.g.*, Switzerland, Austria and Germany, to assimilate the effects of a decree of divorce and nullity. The latter no longer has a retroactive effect and no one can assert the nullity of the marriage until the decree. See *Manual of German Law* (1951), i, p. 157.

Some recent English domestic decisions go strongly in the direction of

ipso facto void; it is merely susceptible to being made void by a decision of a court of law. If two people have been linked together as a result of a ceremony, however abortive, public policy should require the law to presume that they are married until the contrary is judicially established.

Void Marriages

The Royal Commission's proposals with respect to the jurisdiction of the court over void marriages cannot be received without serious misgiving. Article 4 of the Code provides that the court shall have jurisdiction to entertain proceedings for declaring a nullity any marriage alleged to be void if (a) the petitioner is domiciled in England at the commencement of the proceedings, or (b) the petitioner is in England at the commencement of the proceedings.

In other words, there are to be no rules whatsoever as to jurisdiction, since the plaintiff will always come to England simply to start the action.[23] Although a matter of status is involved, jurisdiction is to be assumed more freely than in ordinary actions *in personam*, where it depends upon the presence of the defendant in England at the time when the writ is served. How is this drastic reversal of hitherto accepted notions justified? The reasoning of the Royal Commission seems simply to follow to its apparent conclusion the rule that in English domestic law anyone may rely upon the nullity of a void marriage without the necessity of a judicial decree.[24] This matter has already been discussed; what, however, must be emphasised again is the irrelevance of such arguments in the conflict of laws, particularly in view of the fact that the notion of a marriage void *ipso facto* is rapidly declining in other countries. Again, whatever the category of the marriage, the court's judgment affects the parties' status, and whilst the impediments which render a marriage void are more serious than those making it only voidable, so are the consequences of the decree. It seems contrary to principle, for example, to give to an English court the power, on the basis of the presence of the wife in England, to declare null and void her marriage to a man domiciled and resident abroad. His status is surely affected as well, and to say that no injustice is done because his personal law will be applied is not a complete answer.

equating the effects of the annulment of a voidable marriage with those of the dissolution of a valid marriage: *R.* v. *Algar* [1954] 1 Q.B. 279; *Adams* v. *Adams* [1941] 1 K.B. 536. The Report, para. 1186, brings closer void and voidable marriages by providing for the legitimacy of the children of a void marriage in certain circumstances.

[23] The Report, para. 883, regards it as irrelevant that residence in England is taken expressly for the purpose of starting the proceedings.

[24] The Report, para. 882, also stresses that if the question whether a marriage is void arises incidentally in other proceedings, there are no jurisdictional limitations upon the power of the court to make a declaration as to the nullity of the marriage which will be binding on the parties themselves. Such an incidental determination of nullity would not, however, be a decree upon a matter of status and would not be entitled to recognition abroad. *Cf.* J. H. C. Morris, (1945) 61 L.Q.R. 341, Fleming, (1950) 3 I.L.Q. 9, 228.

On the one hand, the correctness of the application of foreign personal law by the forum must always be problematical and, on the other, the Code leans in favour of nullity rather than validity by providing that in the case of conflict of personal laws the court should look to the law of that country which regards the marriage as a nullity.[25] It has been argued that, as under the domestic system no decree is strictly necessary, the only objection to an English court assuming jurisdiction is that its pronouncement would not be afforded international recognition.[26] As already shown, this is not the only objection but, even if it were, it is surely a very weighty one.

The Report does not contain any reference to *locus celebrationis* as a possible basis of jurisdiction—indeed, there is little need for its inclusion in view of the grant of jurisdiction on the basis of the mere presence of the petitioner. Thus, this omission should not be necessarily interpreted as a condemnation which many would welcome, particularly as no reasons are offered. On the other hand, in two recent decisions of the Court of Appeal[27] there are to be found dicta still favouring this test. The battle, therefore, cannot yet be regarded as won.[28]

In *Casey* v. *Casey*[29] the Court of Appeal refused to exercise jurisdiction over a voidable marriage on the ground of the English celebration of the marriage alone, the respondent husband being resident and domiciled abroad. Bucknill L.J., with whom Cohen L.J. agreed, was impressed by the similarity of annulment on the ground of wilful refusal and divorce. His remarks appeared to refer to voidable marriages only. In *Hutter*, however, Pilcher J. strongly relied on the place of ceremony in words covering both void and voidable marriages: "So far as I am aware, the proposition that this court has jurisdiction to inquire into and pronounce on the validity of every marriage contracted in accordance with

[25] This paper is not concerned with the choice of law, but it is difficult not to express alarm at the possibility contemplated by the Report, para. 885, of an English court having to declare a marriage void for a cause which is repellent to English law, as, for instance, miscegenation. "We do not regard that as a valid objection to our proposal, inasmuch as the court's decree is merely declaratory of the position under the personal laws of the parties." This sounds like slave-like adherence to a questionable principle. It is hard to imagine that an English court would find it possible to declare a marriage void on such a ground. In France, traditionally leaning in favour of the application of personal law, a decree was refused as contrary to "*ordre public*" where the ground alleged was difference of colour: Pontoise, 6 août, 1884, *Clunet*, 1885. 296.

[26] Dicey, *op. cit.*, pp. 252 *et seq.*

[27] *Casey* v. *Casey*, *supra*, n. 9; *Ramsay-Fairfax*, *supra*, n. 1. In *Corbett* v. *Corbett* [1957] 1 W.L.R. 486 Barnard J. recognised a foreign nullity decree primarily on the ground of the competence of *forum celebrationis*.

[28] If Article 4 of the Code does not become law in its present form, then, of course, the problem may become of great importance.

[29] *Supra*, n. 9.

English law in this country has never been questioned."[30] *Casey* is a most valuable decision, in so far as it appears to settle the controversy as to the relevance of the place of celebration in voidable marriages.[31] It did not, of course, find favour with those who advocate more or less unlimited expansion of jurisdiction[32] and it was not followed in Northern Ireland.[33] More surprisingly, Denning L.J. said in his judgment in *Ramsay-Fairfax*, in terms not confined to void marriages: "It may be in these nullity cases that the courts of the domicile also have jurisdiction: so may the courts where the marriage was celebrated."[34] Hodson and Morris L.JJ. showed more regard for *Casey* by refraining from any dicta on the subject.

The decision in *Casey* was negative—the court refused to exercise jurisdiction in the case of a voidable marriage on the ground of celebration alone. On the other hand, there are a number of decisions on void marriages beginning with *Simonin* v. *Mallac*[35] in which jurisdiction on this basis was assumed. In effect, the test of *locus celebrationis* provides in the present law the only tangible difference in point of jurisdiction between the two types of marriage. In *Casey* Bucknill L.J. approved *Simonin* v. *Mallac* not merely because the marriage in that case was void but also because the defect alleged pertained to form.[36] Indeed, the only possible justification for the exercise of jurisdiction on the basis of *locus celebrationis* is precisely this contractual nature of the complaint. As the law of the place of celebration must determine whether the ceremony was valid or not, it is perhaps not unreasonable to say that the courts of that country should have jurisdiction.[37] If, however, this argument, based as it is on a misconceived identification between the choice-of-law rule and jurisdictional competence, were to be allowed, it should be so in all cases and, in particular, in the realm of recognition where the *lex loci celebrationis* considers that defects in formalities render the marriage voidable. Again,

[30] *Supra*, n. 7, at p. 102. *Casey* thus partially overrules *Easterbrook* and *Hutter*, where the fact that the marriages had been celebrated in England contributed to the decisions. In *Ramsay-Fairfax* the marriage was celebrated abroad and the decision is squarely based on residence.

[31] See (1945) 8 M.L.R. 73, where it is asserted, following the refusal of Pilcher J. to differentiate between the two categories of marriage, that *locus celebrationis* gives jurisdiction in both.

[32] Jackson, *op. cit.*, pp. 304–305, would restrict *Casey* to wilful refusal.

[33] *Addison* v. *Addison* [1955] N.Ir. 1.

[34] *Supra*, n. 1, at p. 134.

[35] (1860) 29 L.J.P. & M. 97; (1860) 2 Sw. & Tr. 67.

[36] The absence of parental consent might, however, be classified as a personal rather than a contractual defect: see *infra*, n. 38. According to French law, the personal law of the parties in *Simonin* v. *Mallac*, such defect renders the marriage merely voidable, *nul* but not *nul de plein droit*, and consequently it could be argued that the case is inconsistent with *Casey*. See *infra*, p. 575.

[37] This argument finds favour with Somervell L.J. in *Casey*, *supra*, n. 9, at p. 433, and Andrews L.C.J. in *Mason* v. *Mason* [1947] N.Ir. 134, 146. For a contrary view, see Fleming, *op. cit.*; H. E. Read, *Recognition and Enforcement of Foreign Judgments* (1938), pp. 234 *et seq.*

this reasoning is out of place wherever the defect is a personal one. There are, however, precedents of jurisdiction being assumed on the basis of celebration in England despite the personal character of the complaint.[38]

In effect, it would seem that on no principle can the exercise of jurisdiction on the basis of celebration alone be defended. Marriage is a social institution, not merely a contract. Even in the field of contract itself much less respect is paid today to the *locus contractus* than was done in the nineteenth century.[39] This change of attitude is due to the realisation that as the *locus* may be casual the contract may have no real connection with the country in question. *A fortiori*, this must be true with respect to marriage.[40]

Voidable Marriages

The Royal Commission's Report stresses that the annulment of a voidable, as opposed to a void, marriage has the same effect on the personal status of the spouses as the dissolution of a valid one.[41] Consequently it recommends that the jurisdiction of the court in respect of proceedings to annul a voidable marriage should be governed as far as possible by rules similar to those which regulate the divorce jurisdiction of the court. The Report thus adopts the reasoning of Bateson J. as the basis for its proposals. Article 5 of the Code provides that the court shall have jurisdiction (i) if the applicant is domiciled in England at the commencement of the proceedings; or (ii) if the applicant is in England at the commencement of the proceedings and the place where the parties last resided together was England; or (iii) if the parties to the marriage are both resident in England at the commencement of the proceedings. The court, however, shall not grant a decree unless the personal

[38] *Sottomayor* v. *De Barros* (*No. 1*) (1877) 3 P.D. 1; *Linke* v. *Van Aerde* (1894) 10 T.L.R. 426; *Srini Vasan* v. *Srini Vasan* [1946] P. 67. The list becomes longer, and the argument still weaker, the moment the Royal Commission's recommendation that "lack of consent" should be classified as a personal defect is accepted: Report, para. 887. This may be the law already in so far at least as the consent to the marriage of the parties themselves is concerned: *Way* v. *Way* [1950] P. 71; *Kenward* v. *Kenward* [1951] P. 124, 134 (*per* Evershed M.R.).

[39] Westlake thought that jurisdiction was only justified for the sake of correcting the civil register of the country: *A Treatise on Private International Law*, 5th ed. (1912), para. 49. Bentwich in the sixth edition ((1923) para. 49), doubted whether this ground alone would ever be sufficient. Today in the United States jurisdiction of the place of celebration is quickly disappearing, being replaced by domicile: Rabel, *The Conflict of Laws, A Comparative Study* (1945), i, p. 538. It is not settled whether a Scots court will exercise jurisdiction on this ground: Fleming, *op. cit.*; Report, para. 872. In Canada, again, the position is unsettled: J. D. Falconbridge, (1948) 26 Can.Bar Rev. 907.

[40] In *De Reneville*, *supra*, n. 9, at p. 122, Bucknill L.J. stressed with reference to the court of the country where the marriage was celebrated that "such a court might be extremely inconvenient to both parties and if neither party was domiciled or resident in the country it is difficult to see what interest that country would have in their matrimonial status."

[41] Report, para. 892.

law of one or both of the spouses at the time of the marriage recognises as sufficient ground for the annulment of the marriage (or for divorce) a ground substantially similar to that on which a decree is being sought in England. Jurisdiction is thus to be entertained on both domiciliary and residence bases.

1. *Domicile*

A strictly historical approach would require the consideration of residence to precede that of domicile. Until *Salvesen*[42] it was by no means settled that domicile by itself would in this field be sufficient.[43] The House of Lords, however, clearly regarded domicile as the primary, if not exclusive, basis in both nullity and divorce.[44] In *Inverclyde* Bateson J. restricted the scope of domicile in annulment suits to voidable marriages.[45] He was not concerned with the effect of a void or voidable marriage upon the domicile of the wife. This point arose in *De Reneville*,[46] where the Court of Appeal proceeded on the footing that whilst a voidable marriage transfers to the wife the domicile of her husband, a void marriage has no such effect. It is perhaps too late for the courts to change these rules but when Parliament embarks upon a statutory restatement of the law it would be worth considering the abolition of this difference between void and voidable marriages.[47] One of two possible solutions could then be adopted. The first is to regard the wife as having retained her own domicile whether the marriage be void or voidable. The court would in such a case assume that what the petitioner alleges is true.[48]

The other possible alternative is to hold that whether the marriage is alleged to be void or voidable the domicile of the husband passes to the wife until the decree dissolving the marriage gives her freedom to acquire one of her own. This solution would have the merit of making English law conform more closely to Continental rules. There is no good reason why a void marriage should not generate a few of the effects of a valid marriage, especially as a free union itself is not without some. It is no longer a valid objection to this proposal to stress the hardship to the wife in view of the fact that today jurisdiction is so widely

[42] *Supra*, n. 18.
[43] See *Roberts* v. *Brennan* [1902] P. 143.
[44] Viscount Haldane left open the possibility of jurisdiction in restricted cases on some other (unspecified) basis. Viscount Dunedin and Lord Phillimore spoke strongly in favour of the exclusivity of domicile. In *Hutter* Pilcher J. doubted whether Lord Phillimore's words meant that residence was by itself not enough, *supra*, n. 7, at p. 107. But, with respect, that is their meaning on any fair reading of the report.
[45] *Supra*, n. 5.
[46] *Supra*, n. 9.
[47] See the present writer's comments in a forthcoming article in the L.Q.R.
[48] Pilcher J. said in *Hutter* that the wife "has always been resident in this country and has probably, in law, never lost her domicile of origin": *supra*, n. 7, at p. 111. The marriage was voidable. Hodson L.J., in *Ramsay-Fairfax*, *supra*, n. 1, at p. 134, said that Pilcher J. was, in this respect, "corrected" by Lord Greene in *De Reneville*, *supra*, n. 9, at p. 111.

entertained on a residence basis. Her position would be further improved by the adoption of the recommendation of the Royal Commission that a wife who "is living separate and apart from her husband" should be entitled, for the purpose of taking matrimonial proceedings, to assert a separate domicile whether marriage is void, voidable or valid. This recommendation is in itself admirable; it must only be regretted that it is not coupled with a thorough identification of the effects of void and voidable marriages on the wife's domicile.[49]

The proposal to allow a married woman to establish a separate domicile is especially welcome in so far as it furnishes a practical solution to the confusion and doubts engendered by the decision in *De Reneville*.[50] The Court of Appeal appears to have decided in that case that where the character of the marriage as void or voidable and the place of the wife's domicile have to be established in an annulment suit on the ground of impotence or wilful refusal, reference must be made to the law of the matrimonial domicile, French law in the actual case. This seems to be the correct way of stating the net result of the decision which, it is submitted, is thus contrary to the hitherto established rules of private international law and introduces an unwarranted complication into it. It is difficult to see the bearing of the law of the matrimonial home on the question of the court's competence. Domicile (and no distinction in this respect need be drawn between domicile of choice or of dependence) for the purposes of jurisdiction must be regarded as a fact to be determined by the *lex fori* as far as its interpretation and existence are concerned. Everyone will agree that "it seems obvious on principle that an English court must assign to the conception, say of domicile, that meaning which it bears in English law."[51] It would seem that the same should hold of the question whether a wife does or does not have an English domicile in order to be able to petition for annulment in England. There is no obvious reason why the line should be drawn at definition or why the court should not differentiate between domicile for competence and

[49] Report, para. 825. This right is to be given solely for jurisdictional purposes. The Standing Committee on Private International Law (appointed by the Lord Chancellor in September, 1952) had already fully considered the question whether married women should be able to acquire a separate domicile and concluded in its Report published in February, 1954 (Cmd. 9068) against any change in the law in this respect, with the exception of the case of a married woman who had been separated from her husband by order of a court of competent jurisdiction. The Committee was anxious not to trespass upon the terms of reference of the Royal Commission and pointed out in its Report, para. 17 (ii), that "the difficulties experienced by a deserted wife arise . . . not so much from the conception of domicile as from the rules governing jurisdiction in matrimonial causes." There is thus no real conflict between the views of the Committee and those of the Royal Commission. On the Report of the Standing Committee and the proposed Code of the Law of Domicile, see R. H. Graveson, (1954) 70 L.Q.R. 492.

[50] *Supra*, n. 9.

[51] Cheshire, *op. cit.*, p. 52.

domicile for choice of law purposes.[52] In *White* v. *White*[53] Bucknill J. held, without any reference to the law of the matrimonial home, that the wife was domiciled in England and the same course was adopted by Barnard J. in *Mehta* v. *Mehta*.[54] Again, in *De Reneville*[55] itself in the High Court it did not even occur to Jones J. to refer to the law of France for the purpose of classifying the marriage. The principle enounced by the Court of Appeal in *De Reneville* cannot fail in many cases to result in stalemate or legal anarchy. There is an air of unreality about the decision. If the court had taken the trouble to refer to French law it would have found that impotence and wilful refusal did not make a marriage either void or voidable but both in certain circumstances might constitute an *injure grave* for which a divorce could be obtained. It would also have discovered that French courts consider it contrary to public policy to grant a decree of nullity on these grounds.[56] Again, the court consulted French law to ascertain whether the marriage was void in the sense that no judgment was needed to find it so. In effect, in French law a marriage is never *ipso facto* void. The French courts always look upon any marriage as valid until it has been declared void, and will not allow anyone in the meantime to treat it otherwise. There is always a title and an appearance which must be destroyed by the court.[57] The feeling of unreality is increased by the court's reliance on the rule that as French law was not proved it must be presumed to be the same as English law. This presumption may be convenient in practice and justifiable in theory where the laws in conflict are of common origin, but it degenerates into a mischievous fiction when it is or ought to be known that the basic conceptions of the legal systems in question are profoundly at variance.[58]

According to some writers the Court of Appeal would have been on firmer ground had it ruled that reference to French law was

[52] Domicile is a principle of connection of very general character and wide application. To assert that domicile of a person should be one and the same regardless of the problem at hand is to exaggerate its role artificially at the expense of practical convenience.

[53] [1937] P. 111. In *De Reneville*, *supra*, n. 9, at p. 122, Bucknill L.J. simply remarked that in *White* the court assumed jurisdiction "because the petitioner wife was domiciled and resident in England."

[54] [1945] 2 All E.R. 690.

[55] [1947] P. 168.

[56] Caen 6 mai 1846, D. 1847. 2. 33.

[57] The French courts distinguish between cases of *nullité relative* and *absolue*. But it is important not to take these words too literally. No marriage, even in the case of absolute nullity, is *nul de plein droit*. Nullity of a marriage, whether relative or absolute, must be judicially pronounced. The intervention of the court is said, however, not to be required in the case of the so-called "*marriage inexistant*." This concept was developed by the *doctrine* in the nineteenth century as a consequence of the acceptance of the principle *pas de nullité sans texte*. Today it is rejected by many writers as confusing and spurious and in effect seems to be confined to the one case of concubinage not accompanied by even a semblance of a ceremony. See Planiol et Ripert, *Traité Pratique de Droit Civil Français*, 2nd ed. (1952), ii, pp. 201–204.

[58] See J. D. Falconbridge, (1948) 26 Can.Bar Rev. 907.

not to find simply whether the marriage was void or voidable and then proceed to apply English domestic law [59] but to discover whether, under that law, the wife had a capacity to acquire a separate domicile.[60] However attractive this view may seem, it would appear to suffer from the objection of amounting to an unnecessary surrender to foreign rules in the jurisdictional sphere.[61] Following this argument to its logical conclusion the *ratio* of *De Reneville* ought to be applied in all suits where jurisdiction is assumed on the basis of domicile and especially in divorce. No justification, however, for this view is to be found in the actual judgments. It would bring the law of this country dangerously near to the theory that the law of domicile which should govern under the choice-of-law rule of the forum should also in all cases determine where the domicile is and how it is defined.

The Royal Commission's recommendation places the problem of the ascertainment of the domicile of the married woman squarely within the province of the *lex fori*.[62] The burden of proof is to be on the wife to establish that the circumstances are such that, had she been a single woman, she would be held to have acquired an English domicile. Where the wife was domiciled in England immediately before the marriage, or immediately before the separation, and is resident in England at the commencement of the proceedings, she should be deemed to have acquired an English domicile, unless there is evidence to the contrary.[63] These are admirable suggestions which would bring English practice more into line with that of the Continent [64] and their adoption would make away with most of the difficulties created by the decision in *De Reneville*.[65]

[59] Under many systems a void marriage transfers the husband's domicile to the wife.

[60] Graveson, *op. cit.*, n. 17; Jackson, *op. cit.*, p. 270. There are a few decisions of French tribunals in this direction but they must be regarded as exceptional. See P. Benjamin, *Le Divorce, La Separation de Corps et leurs Effets en Droit International Privé Français et Anglais* (1955), p. 31. On one occasion a Swiss court applied *lex patriae* ("American" law) to ascertain whether a married woman could establish an independent domicile: Genève, 5 decembre 1919, Sem.Jur. 1920. 196.

[61] The courts all over the world reserve to themselves a great deal of discretion in ascertaining a person's domicile. Rabel, *op. cit.*, p. 140. See also P. Lerebours-Pigeonnière, *Précis de Droit International Privé*, 5th ed. (1948), No. 261.

[62] *Lex fori* as such is not mentioned in the Report and the Code but its application is implicit in the main proposal. The fact that under the law of the matrimonial home the wife has no capacity to establish a separate domicile is thus irrelevant.

[63] Report, para. 825; Code, Art. 6 (1) (2).

[64] Rabel, *op. cit.*, p. 140. Batiffol, *Traité Elémentaire de Droit International Privé*, 2nd ed. (1955), No. 403.

[65] Those added by *Chapelle* v. *Chapelle* [1950] P. 134, where Willmer J. purported to apply the *ratio* of *De Reneville* to the problem of recognition of a foreign decree, will now be met by the Royal Commission's comprehensive proposals with respect to the recognition of foreign decrees. *Chapelle* may

2. *Residence*

The Court of Appeal in *Ramsay-Fairfax* [66] pronounced in favour of the jurisdiction of the court to decree a voidable marriage null on the ground of residence of both spouses in England. The Code proposes the same and also gives the court jurisdiction if the petitioner is in England at the commencement of the proceedings and the place where the spouses last resided together was England. The Court of Appeal justified this departure from the principle of domicile, on the one hand, by reference to the competence of the ecclesiastical tribunals and, on the other, by reasons of convenience and justice. The Report makes no reference to the ecclesiastical practice and appears to be guided principally by reasons of convenience.[67]

Ecclesiastical Practice

Jurisdiction in matrimonial suits before 1858 belonged to the ecclesiastical tribunals and was based on the residence of the respondent within the diocese. Many writers have deplored the judicial attitude of following, in the very different conditions prevailing today, ecclesiastical precedents which were largely founded on the concept of marriage as a sacrament and were not really concerned with the international jurisdiction of the English courts.[68] There is no need to reiterate the arguments used by the courts [69] and their non-judicial critics in this controversy. But it is relevant to stress the somewhat inconsistent reluctance on the part of the courts to accept all the implications of their standpoint. Thus, Pilcher J., in *Hutter*, announced on page 100 the ecclesiastical rule that residence of the respondent alone was the basis of jurisdiction, but on page 103, stating the modern position, referred to "the mere residence *of the parties*." [70] In *Ramsay-Fairfax* Denning L.J. combined the two in one passage: "If *the respondent*, the defendant to a petition, was resident within the local jurisdiction of the court, then the court had jurisdiction to determine it. So in

be regarded either as carrying the principle of *De Reneville* still further, or, indeed, as being inconsistent with it. See R. Cross, (1950) 3 I.L.Q. 247 and the present writer's comments in a forthcoming article in the L.Q.R.

[66] *Supra*, n. 1.

[67] Once again it must be regretted that the Report contains little information as to the motives for its main recommendation.

[68] J. H. C. Morris, (1945) 61 L.Q.R. 341; J. F. Garner, (1947) 63 L.Q.R. 486; Fleming, *op. cit.* For a different view, see Jackson, *op. cit.*, p. 244.

[69] Principally based on the interpretation of section 22 of the Matrimonial Causes Act, 1857. See, especially, the judgment of Pilcher J. in *Hutter*, *supra*, n. 7, and the decision of the Court of Appeal in *Ramsay-Fairfax*, *supra*, n. 1.

[70] *Supra*, n. 7 (italics supplied). In *Sim* v. *Sim* [1944] P. 87, a separation case, Pilcher J. assumed jurisdiction although only the respondent husband was resident in England. However, he partially relied on the fact that the ecclesiastical courts regarded an unseparated wife as prima facie resident where her husband was resident. See 8 M.L.R. 73.

the present case. The *husband and wife* were, at the issuing of the petition, both resident in this country, and that is sufficient to give the court jurisdiction to decide the case."[71] Again, the ecclesiastical tribunals had no hesitation in assuming jurisdiction wherever the respondent submitted to the suit.[72] Yet in *De Reneville* Lord Greene M.R. repudiated such jurisdiction.[73] The courts have thus succeeded in restricting the jurisdiction previously enjoyed by the ecclesiastical tribunals. They have also found it possible to increase it by proceeding, since 1860, on the basis of England being the *locus celebrationis*.[74] It would seem that the ecclesiastical practice cannot be used as a definite argument against a free and rational development of this branch of the law. Residence must be shown to be a suitable test of jurisdiction by intrinsic virtues alone.

Convenience and Justice

The most obvious attraction of residence as a test of jurisdiction is its solid foundation in a material fact. Whilst residence appears concrete and real, domicile seems vague, abstract and often fictitious. But a moment's reflection reduces the clarity of the distinction. Residence is an easily ascertainable fact as long as it is identified with physical presence and no attention is paid to its quality. Once quality is introduced, residence assumes the features of uncertainty and indefiniteness characteristic of domicile. The courts in this country have not been particularly anxious to analyse the concept of residence in the field of conflict of laws. Adjectives occasionally used, such as "permanent,"[75] "bona fide,"[76] "not transient"[77] or "ordinary,"[78] do not greatly add to the understanding of it. Lord Watson, delivering the judgment of the Privy Council in *Le Mesurier* v. *Le Mesurier*, echoed this sentiment: "Bona fide residence is an intelligible expression, if, as their Lordships conceive, it means residence which has not been resorted to for the mere purpose of getting a divorce which was not obtainable in the country of domicile. Residence which 'is not that of a traveller' is not very definite; but nothing can be more

[71] *Supra*, n. 1, at p. 132 (italics supplied).
[72] *Chichester* v. *Dougal* (1822) 1 Add. 5.
[73] *Supra*, n. 9, p. 113. See Graveson, *op. cit.*, n. 28. In *Sim*, *supra*, n. 70, Pilcher J. logically enough thought that submission was relevant.
[74] *Simonin* v. *Mallac*, *supra*, n. 35.
[75] *De Reneville*, *supra*, n. 9, at p. 123 *per* Bucknill L.J.
[76] *Brodie* v. *Brodie* (1861) 2 Sw. & Tr. 259, 263.
[77] *Harford* v. *Morris* (1776) 2 Hag.Con. 423, 431, *per* Sir George Hay. Dr Lushington in *Collett* v. *Collett* (1843) 3 Curt. 726, at p. 730 stated that residence is "not inhabiting accidentally and for a single purpose, within the jurisdiction; but means a general habitation into the place in which the jurisdiction of ecclesiastical courts is founded."
[78] Matrimonial Causes Act, 1950, s. 18 (1) (*b*).

vague than the description of residence which, not being that of a traveller, is not to be regarded as 'casual.'" [79]

Some guidance as to the judicial attitude is offered by the decisions on the effect of residence upon liability to income tax.[80] These are not, however, as helpful as might be expected since the courts treat the question of residence as one of fact or degree to be determined by the Commissioners in the light of all the material circumstances. In *Inland Revenue* v. *Lysaght*, Lord Warrington made this very clear: "I cannot say that there was no evidence on which the Commissioners could properly arrive at their conclusion though I am not sure I should have taken the same view." [81]

At first sight the notion of residence differs from that of presence in the *animus residendi* accompanying the former. Beale writes that "To become a sojourner, no intention whatever is necessary, merely the fact of personal existence in the place. For residence there is an intention to live in the place for the time being." [82] In this country, however, for taxation purposes the intention to reside does not appear to be an essential element. There is no need to show that the visitor chose England as a desirable place to live and he may be regarded as resident even when his arrival was due solely to business necessity or a sense of duty.[83] On the other hand, it is evident that the existence of a positive intent to establish residence in this country is a very important fact to be taken into account by the Commissioners when reaching their decision.[84]

The problem of intention apart, the decisions in tax cases clearly distinguish between presence and residence by laying stress on the quality and character of the actual sojourn in the latter case. Whilst there is no need to show a fixed place of abode in

[79] [1895] A.C. 517, at p. 538. In *Ramsay-Fairfax*, *supra*, n. 1, in all the judgments the word "residence" is used without any qualifying adjectives. In *Lewis* v. *Lewis* [1956] 1 W.L.R. 200, Willmer J. brought "ordinary residence" near to domicile by holding that everyone, except nomadic people, must be deemed to have it.

[80] The expression "residence" is not defined in the Income Tax Acts and the decisions proceed on the basis that the Acts do not attach any technical or special meaning to it and that it is used in its ordinary common sense. For a full account of tax cases see A. Farnsworth, *The Residence and Domicil of Corporations* (1939) pp. 1-19.

[81] [1928] A.C. 234, at p. 251.

[82] *A Treatise on the Conflict of Laws* (1935), i. p. 109. Such an intention may be hard to prove but it is more easily ascertainable than the *animus semper manendi* required by English law for the acquisition of domicile.

[83] *Inland Revenue* v. *Lysaght*, *supra*, n. 81. His presence must, of course, be the result of free will and deliberation. The words of Lord Buckmaster, *ibid.*, at p. 248, should not be read too literally. See *Inchiquin* v. *Inland Revenue* (1948) 31 T.C. 125.

[84] See, *infra*, n. 87.

this country,[85] the courts, in its absence, are only prepared to find that a person is resident when his visits to England are in accordance with his regular habits of life.[86] The length, repetition and regularity of the visits must be contrasted with transitory residence which is in effect equivalent to mere physical presence. It thus appears that a stay in hotels, even if prolonged, will not be sufficient to establish residence for tax purposes, unless it forms part of the regular mode of life or, indeed, an *animus residendi* can be proved.[87]

Although the word "residence" is used in the Report and the Code it is evident that only factual abode is contemplated, in effect little more than mere physical sojourn. No definition of the concept is attempted and no information as to the intended meaning is given. The Report, however, on one occasion does refer to "a few days' residence" as sufficient [88] and regards the coming of the parties to England expressly for the purpose of taking matrimonial proceedings as irrelevant.[89] Thus, "residence" as understood by the Royal Commission may be transient and need not be bona fide.[90] The presence of both parties in England for a few days preceding the commencement of the proceedings seems all that is required. Here, it is advanced, lies a major weakness of the recommendations. As long as domicile remains fettered by an exaggerated emphasis placed on the factor of intention, some resort to residence for the purpose of jurisdiction must be made to prevent hardship to litigants. The Standing Committee on Private International Law felt unable to propose any change in the definition of domicile so as to bring English law into line

[85] *Cooper* v. *Cadwalader* (1904) 5 T.C. 101; *Reid* v. *Inland Revenue* (1926) Sc.L.T. 365.

[86] *Cooper* v. *Cadwalader*, *supra*, n. 85; *Levene* v. *Inland Revenue* [1927] 2 K.B. 38; *Inland Revenue* v. *Lysaght*, *supra*, n. 81; *Inland Revenue* v. *Combe* (1932) 17 T.C. 405.

[87] s. 375 of the Income Tax Act, 1952, provides that a person who is in the United Kingdom for a temporary purpose only and not with any intent to establish his residence and has not resided therein for a period of six months in any year, is not taxable in respect of any foreign possessions and securities. There is little doubt that this section envisages presence as opposed to residence proper and the words of "residence" and "resided" correspond with "is." *Cf.* E. M. Konstam, *The Law of Income Tax*, 12th ed. (1952), No. 291.

[88] Report, para. 832.

[89] *Ibid.*

[90] s. 18 (1) (*b*) of the Matrimonial Causes Act, 1950, speaks of the petitioner being "ordinarily resident" in England; Jackson, *op. cit.*, p. 228, thinks this means "bona fide" residence. Presumably it also connotes some degree of continuity. In *Hopkins* v. *Hopkins* [1950] 2 All E.R. 1035 Pilcher J. held that the word "ordinarily" adds nothing to the adjective "resident." On the other hand, he agreed with the view of Lord Cave, expressed in *Levene* v. *Inland Revenue*, *supra*, n. 86, at p. 232, that both the expressions connote "residence in a place with some degree of continuity and apart from accidental or temporary absences." There is in fact no tax decision in which a person was held "resident" but not "ordinarily resident" in the United Kingdom.

with the majority of other systems.[91] The Royal Commission, though not without some hesitation,[92] inclined towards the same view. On the other hand, the Royal Commission does propose that a married woman should be allowed a separate forensic domicile [93] and most of the cases of hardship existing before 1950 would be met by this reform. Resort to residence is thus rendered far less pressing despite the refusal to re-define domicile. None the less the Royal Commission proceeds to recommend that jurisdiction should also be entertainable on the ground of what appears to be little more than presence without any endeavour to justify this course. This proposal, with respect, must be resisted. Marriage is an enduring relationship. It affects the parties to it, third parties and the State. On no principle can mere casual residence give competence to sever it definitely. As will be shown below,[94] the shield of personal law is not always reliable.

If, however, residence we must have, let it be controlled in some way. There are two obvious devices.[95] The first is to define it restrictively. One would have expected the Royal Commission to have insisted on the bona fide character of residence and also to have required some evidence of its continuity. The other is to demand a minimum period of residence before jurisdiction becomes exercisable. This, again, the Royal Commission felt disinclined to do, putting its trust as always in the application of personal law.[96] In this respect section 18 (1) (*b*) of the Matrimonial Causes Act,

[91] On the Continent "habitual residence" plus capacity are generally sufficient to establish a domicile. See Wolff, *op. cit.*, p. 104; L. Josserand, *Cours de Droit Civil Positif Français*, 3rd ed. (1938), i, p. 158.

[92] Report, para. 818.

[93] *Supra*, p. 574.

[94] *Infra*, p. 583.

[95] There may be others, as demonstrated by the practice of Continental States where residence is used as a supplement to jurisdiction primarily based on nationality, just as in this country it supplements domicile. Neither the practice of France nor Germany goes so far as the Royal Commission's proposals. A French court will only exercise jurisdiction over a foreigner if the respondent is domiciled (in the sense of habitual residence) in France. A prolonged stay in France may in itself be insufficient except where the respondent has no domicile in the country of his origin and no other court is competent. Benjamin, *op. cit.*, p. 29; Planiol et Ripert, *op. cit.*, p. 434. There are few traces of similar ideas in this country. In *De Reneville*, *supra*, n. 9, at p. 105., Somervell L.J., *arguendo*, asked: "Might it be possible to take the view that if the court of the domicile is available, there is no jurisdiction here, but that if there is no available court of the domicile this court might entertain the suit, to prevent the petitioner being left without remedy?" According to German law jurisdiction must not be exercised where neither spouse possesses German nationality. An exception is made where either party has his habitual residence (*Wohnsitz*) in Germany *and* the *lex patriae* of the husband recognises a divorce granted by a German court or the wife was a German national at the time of the marriage and the action is one of nullity: *Manual of German Law*, ii (1952), p. 24. A person has his *Wohnsitz* at the place where his activities have their centre. A wife shares the *Wohnsitz* of her husband, a legitimate child that of his father. The *Wohnsitz* thus is something less than the English domicile yet considerably more than residence as envisaged in the Report.

[96] Report, para. 830.

1950, appears infinitely preferable in so far as it lays down a minimum period of residence, on the part of the petitioner,[97] for three years. No doubt it suffers from some defects which should be put right. Thus relief under it is available to a wife but not to a husband and, above all, there is no direction for the application of personal law. Nevertheless, it represents something solid, something worthy of respect abroad. A decree granted on the basis of a few days' residence of two parties in England is not likely to be recognised, however valiant the attempt by the court to apply the correct law. A minimum statutory period of residence for two or three years dispenses with any need to produce evidence of intention. Very few persons are able to change their local connections and set up and maintain a new home and business during such a prolonged period. Objections to a minimum period of residence are usually founded on hardship or natural justice. The wife, the Report stresses, may not be able to take up residence in England for three years for financial reasons.[98] This situation, in so far as it implies that she does not normally live either in England or in the country of her husband's domicile or nationality, cannot be of frequent occurrence. An argument based on hardship is often of a highly speculative character. Jones J. in *De Reneville* [99] thought *Hutter* [1] was a case of hardship, presumably because the husband was not able to obtain a decree for wilful refusal in the state in the United States where he was domiciled. The Royal Commission, with its insistence on the application of personal law, would certainly not have reciprocated this sentiment. The combined effect of section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, and the proposal to allow a wife to set up a separate forensic domicile is to eliminate all cases of real hardship. The time has come to arrest the current tendency to widen the bases of jurisdiction. Any further extension of the jurisdiction of English courts to suit the convenience of the petitioner, particularly in the extreme form advocated by the Royal Commission, must be regarded as contrary to the best principles of private international law.

Conclusion

There exists a profound unity for jurisdictional purposes between the several matrimonial causes and especially between divorce and

[97] No undue significance should be attached to the requirement of the presence of both parties. This means merely that of the defendant as naturally the petitioner will be there to start the proceedings. In *Ramsay-Fairfax*, *supra*, n. 1, the residence of the respondent was not very substantial but, even so, not as flimsy as that contemplated by the Report. The Draft Convention approved by the International Law Association at its conference at Prague in 1947 favours residence of either spouse for an aggregate period of one year during the eighteen months immediately preceding the institution of the suit. *Report of the 42nd Conference of the I. L. A.*, pp. 142–143; W. Latey, (1952) 1 I.C.L.Q. 229.

[98] Report, para. 796. It adds the difficulty of preserving evidence. The reward of the petitioner for having to wait or to sue at the domicile is a decree which will command far greater respect abroad.

[99] *Supra*, n. 55.

[1] *Supra*, n. 7.

nullity. In both a decree affects status, it deeply interferes with the domestic relations of two persons and the well-being of the State. The likeness between voidable marriages and those open to dissolution has proved irresistible to a number of judges and writers and has prompted the Royal Commission to treat them in a similar fashion. It would seem, however, that in point of jurisdiction no rational distinction can be drawn between void, voidable and valid but dissoluble marriages. Since marital relations most closely concern the community in which the spouses live, where they have made their home, the best test of jurisdiction and law remains that of domicile. Residence, particularly if it be transient or casual, cannot in principle confer any right of jurisdiction. Domicile, however, has been allowed to become an artificial and often sterile conception. As long as it remains unreformed it must be supplemented by residence which should in some degree be habitual or, preferably, maintained for a fixed and not too short period.

In matters of status private international law should aim at stability and universality. The ideal is that whatever the forum the same decision should be given. In other words, the key to the problem is a general and uniform application of personal law. The Report and the Code reflect the acceptance of this aim. But in so doing they injudiciously anticipate possible developments in the unification of private laws. They sin by being perfectionist in an imperfect world. It is, indeed, true to say that if in every case the court would resort to the appropriate personal law the need for jurisdictional restrictions would largely disappear. But it is one thing to provide for the application of the proper law as the Royal Commission does, it is another for the court to apply it. It is beyond the scope of this paper to discuss the problem of personal law, but as its use appears to the Commission the panacea for all the ills, some reference must be made to this subject.

As a matter of strict principle there must always be jurisdictional restrictions wherever status is involved. Under present circumstances it cannot be assumed that the correct personal law will be selected and applied in the same way by any two courts.[2] One of the greatest obstacles in the application of the appropriate law is the difficulty of providing easy, cheap and reliable means for the judge to inform himself of its rules.[3] The Royal Commission appears only partially aware of the problem. It is idle and fraught with danger to advocate the administration of personal, and therefore often foreign, law without a corresponding attempt to organise a method for the courts to acquaint themselves with the contents of that law. Article 10 of the Code contains a recommendation

[2] Courts may easily differ in their choice of proper law. On the difficulties of applying foreign law generally (difference in local conditions, temperament, legal training, interpretation and procedure), see H. C. Gutteridge, *Comparative Law*, 2nd ed. (1949).

[3] R. David, *Traité Elémentaire de Droit Civil Comparé* (1950), pp. 51 *et seq.*

that the court should be empowered to accept as evidence of the law of another country an official certificate (properly authenticated) given by a competent authority of the country concerned (normally an embassy official). This proposal assuredly can only be a palliative of very doubtful value. It gives far too great authority to an official in a traditionally difficult and controversial field. The Report, accordingly, though somewhat vaguely, attempts to confine it "in practice" to cases "where the point upon which information is required is a simple one and is not an issue between the parties to the suit."[4] It was not within the powers of the Royal Commission to recommend any alteration of the unfortunate rule that in England the question of what is foreign law is one of fact, which has to be proved, as other facts are proved, by appropriate evidence.[5] The court is not allowed to inquire *ex officio* into the contents of foreign law. This rule, of questionable value in other fields, appears most incongruous in the conflict of laws. The experience of other countries shows that the evidence obtained by means of official certificates is of a mediocre kind. German law, accordingly, places a definite duty upon the judge to do everything possible to interpret, complete and correct the official certificate in order to satisfy himself of the existence and effect of the rule in question. It follows that there is in fact no burden of proof in respect of foreign law.[6] The *Cour de Cassation* also recognises the power of the judge to ascertain the contents of the foreign law over and above the evidence embodied in the certificate.[7] But as a learned French writer remarks: "Nothing in the education which a judge is receiving at the present time is destined to make him acquainted with foreign law and, what is more serious, he is very badly prepared to understand the meaning of the official certificate offered to him."[8] Occasionally and inevitably, afraid of being led into error, he will tend to resort to various devices in order to apply the law of the forum.[9] In this country these difficulties are even more obvious. As the education and tradition of an English judge equip him badly to deal with any of the civil law systems, the danger is that either he will be misled by the certificate or he will shelter behind the fiction that foreign law of which no evidence is offered is the same as the law of England.[10] It is respectfully advanced that here is a very real problem which should be fully

[4] Report, para. 916. No such restrictions are mentioned in the Code.

[5] It is, however, provided by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 102, that questions of foreign law must be determined by the judge and not be left to the jury. Gutteridge, *op. cit.*, p. 47, writes that "there is a strong case for the relaxation of the rule which forbids a judge to go outside the four corners of the expert evidence presented to the court."

[6] Z.P.O., section 293, as interpreted by the *Reichsgericht*. See *Manual of German Law* (1952), ii, p. 8.

[7] Cass.Req., 29 juillet 1929, D.H. 1929. 437.

[8] David, *op. cit.*, pp. 52, 53.

[9] Usually to the conveniently elastic concept of the *ordre public*.

[10] *Supra*, p. 575.

investigated before any definite steps are taken in the direction of throwing overboard the jurisdictional fetters.[11]

The judicial task is at first sight no more difficult in the matrimonial field than in others, but on closer scrutiny many complicating factors appear. To begin with, chances of mistake are much greater since petitions for divorce or nullity are very often undefended. Then there is the vast and indefinite topic of public policy which so prominently figures in all questions of personal status. It will, for instance, be difficult enough for an English judge to understand what is meant in French law by an *injure grave*, an ambiguous and constantly changing ethical concept; it will be much more difficult for him to apply it in the light of current views on public policy and morality. In this field the law of France concedes a very considerable discretion to the courts. In effect, it leaves to them the decision as to the sufficiency or otherwise of a certain act or omission to constitute an *injure grave*.[12] Inevitably their conclusions are not uniform. Furthermore, there is the difficulty caused by the definition occasionally given by the French courts to some of such acts or omissions: impotence to be operative must have been known to the impotent spouse at the time of the marriage; strict proof must be offered of wilfulness and deliberateness in the case of non-consummation of the marriage. All these considerations make the task of an English court applying French law in a matrimonial suit a truly formidable one. Last, but not least, if the foreign law is to be administered at all, it must be so in its entirety and this may involve resort to procedures for which, in the forum, there is no machinery available.[13]

It is still very true to say that the choice of the court by the petitioner may be of vital significance to him, and this fact must be borne in mind whenever any widening of jurisdiction is considered. An examination of other systems supports this submission. Traditionally the civil law countries laid stress on the application of personal law at the expense of jurisdictional restrictions, whilst the

11 According to Gutteridge, *op. cit.*, pp. 45 *et seq.*, "the only alternative which would function in practice" is to make use more freely of the discretionary powers possessed by the English courts to obtain advisory opinions from foreign courts. But the latter may not be willing to help, nor possess any suitable machinery. Rabel, *op. cit.*, p. 413, mentions a case where a Swiss court tried to consult the Supreme Court of the United States on "American" divorce law but was informed that neither courts nor administrative agencies in the United States were prepared to give advice. Of far greater interest is a suggestion made to the Royal Commission, Report, para. 919, that a digest of the matrimonial laws of other countries should be compiled of which the court might take judicial notice. The Commission sees distinct merit in this proposal but does not envisage that "it would be of any use in cases where the point of law was in dispute; it would then still be necessary for expert evidence to be called."

12 Planiol et Ripert, *op. cit.*, pp. 380 *et seq.*

13 This point is, of course, especially pertinent in the matter of divorce. The French law insists on a preliminary *conciliation judiciaire* before the President of the court. To refer to French law for the actual substantive rules and to ignore this procedural *préliminaire* is to upset the balance of a system conceived as a whole.

common law countries did the reverse. The Report and the Code endeavour to secure a greater measure of uniformity between the two systems. This, in itself a praiseworthy attempt, ignores the fact which has been recently growing more and more patent, that the Continental courts very often merely pay lip-service to the principle. The notion of *ordre public* becomes notoriously expansive and justifies an ever-increasing number of exceptions to the application of personal law.[14] There can also be noticed a corresponding movement towards some restriction of jurisdiction.[15]

The criticisms made in this paper refer only to some of the proposals of the Royal Commission. It must be stressed that in many respects the Code is a most admirable attempt to grapple with a proverbially intractable subject. It heralds greater progress than many had dared to hope. This is particularly true of the bold stand taken in the matter of choice of law. There can be no justification for the grant of a decree in England on a ground unknown to the personal law of the parties.[16] But the application of that law, however imperative, must still be imperfect and, as long as this remains so, solution must be sought in a well-balanced compromise between jurisdiction and law.

J. K. Grodecki.*

[14] Batiffol, *op. cit.*, No. 356 *et seq.*; David, *op. cit.*, p. 56; Lerebours-Pigeonnière, *op. cit.*, No. 270; Benjamin, *op. cit.*, p. 80. There are other devices for excluding personal law; damages to which the petitioner in a French court is entitled on a petition for divorce are governed by *lex fori* as *lex loci delicti*: Batiffol, *op. cit.*, No. 471; Benjamin, *op. cit.*, p. 131. The Dutch courts abandoned their former reliance on personal law and openly apply the *lex fori*: Rabel, *op. cit.*, p. 428.

[15] Niboyet, *op. cit.*, p. 749. Rabel, *op. cit.*, p. 445, says: "The European courts are coming back to where the English and American courts have remained."

[16] *Easterbrook*, *supra*, n. 6.

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THE RATIO DECIDENDI OF A CASE

In his comment [1] on my article [2] dealing with some aspects of the doctrine of precedent Simpson makes one point which I consider valid, but overlooks a number of considerations which arise from a more thorough analysis of the doctrine of precedent than was possible for either of us in our short notes.[3] The valid point is concerned with Goodhart's article "Determining the *Ratio Decidendi* of a Case.[4] Simpson accepts as the Goodhart theory the proposition that "the *ratio decidendi* of a case can be defined as the material facts of the case plus the decision thereon." [5] He points out that there is an opposed theory, which may be conveniently called the "classical theory," which is that "the ratio is 'the principle of law which the judge considered necessary to his decision.'" [6] Simpson avers that "the rule stated by the judge ought, therefore, upon the basis of Professor Goodhart's arguments, to be treated as the *ratio decidendi*." What I regard as valid in this statement is the suggestion of an inconsistency in the reasoning of Goodhart in his article. But this inconsistency does not appear until one realises that there are two separate theses in Goodhart's article, one of which is not referred to by Simpson. On the other hand, once Simpson's terminology is examined carefully it will be seen that some of the propositions he asserts cannot be supported: (a) Goodhart's theory of "*ratio decidendi*" does not lead him to accept the judge's explicitly stated rule as the *ratio decidendi*, though it does lead him to accept the judge's inexplicitly stated rule; (b) the classical theory is distinguishable from Goodhart's theory; (c) Stone has not criticised the classical theory of precedent, but a theory which is assumed by Goodhart as the premiss leading to Goodhart's own particularisation.

The two phrases which particularly call for consideration in Simpson's note are (i) *ratio decidendi*, (ii) facts of the case. It is my submission that with regard to these phrases Simpson has failed to note their ambiguity.

Two important meanings of the phrase "*ratio decidendi*" to

1 (1957) 20 M.L.R. p. 413.
2 (1957) 20 M.L.R. p. 124.
3 Some fuller analysis is to be found in my articles: "The Language of and a Notion for the Doctrine of Precedent," 2 West Aust.L.R. at pp. 329 and 504; "Law Making and Law Applying," (1956) South African L.J. 187.
4 40 Yale L.J. (1930) reprinted in Goodhart, *Essays in Jurisprudence and the Common Law*, p. 1, and in Vanderbilt, *Studying Law*, p. 493.
5 This is Glanville Williams' summary in *Learning the Law* (3rd ed.), p. 57, which I accepted as accurate.
6 The appellation "classical theory" for this theory is Paton's (*Jurisprudence*, 1st ed., p. 159). It is the "classical" theory of some English judges, but not of English jurists.

be found in a survey of its use are the following.[7] (1) The phrase sometimes signifies the rule of law propounded by the judge as the basis of his ultimate decision of the case. This is the meaning often given to the phrase by judges, following Lord Campbell in *Att.-Gen.* v. *Windsor*.[8] The full significance of this concept requires fuller elaboration than I can give in this note. The concept, for example, embraces both the explicit formulation by the judge of a proposition, and the implicit formulation. In my submission Goodhart's thesis is but a variation of Austin's statement as to how an implicit *ratio decidendi* is determined.[9] (2) The phrase is sometimes used to mean the rule of law for which a case is of binding authority. This is the meaning attributed to the phrase by Salmond and a number of other jurists who have followed him.[10] It is the meaning explicitly adopted by Goodhart in his article, and implicitly by Simpson in his note.

Since both usages exist both meanings are "correct." I find somewhat misleading Simpson's description of my article as being one which "contrasts two views as to the correct definition of the *ratio decidendi* of a case." The word "definition" is ambiguous: the analysts no longer insist that it must refer to the meaning of a name. That strange error ignored the existence of the phrase "real definition." I do not think Simpson fully brings out how the ambiguity of the phrase leads to difficulties in the theory of precedent. The terminology whereby "*ratio decidendi*" signifies the rule propounded by the judges should not be allowed to be used to beg the question whether such a rule is of binding authority. The

[7] A fuller examination of the use of the phrase "*ratio decidendi*" is to be found in 2 West Aust.L.R. at pp. 305 and 319.

[8] (1860) 8 H.L.C. at p. 391. The rule "propounded and acted upon in giving judgment." For recent examples of this judicial usage, illustrating both the terminology and acceptance of the classical theory see *Wood* v. *Wood* [1957] 2 All E.R. *per* Lord Evershed M.R. at pp. 19H, 20I and 21E, and *Behrens* v. *Bertram Mills, Ltd.* [1957] 1 All E.R. *per* Devlin J. at 594A. See also *Midland Ry.* v. *Western Australia* [1956] 3 All E.R. *per* Lord Cohen at p. 277I.

[9] "The general reasons or principles of a judicial decision (. . . abstracted from any peculiarities of the case) are commonly styled, by writers on jurisprudence, the *ratio decidendi*." *Lectures in Jurisprudence* (1873 ed.), p. 648. I have not been able to trace the "writers on jurisprudence." Presumably they are those studied by Austin in Germany. Austin's account of the process of "detaching" general grounds from specific peculiarities is worded in one place in such a way as to be capable of referring not to a process of generalisation, but to the enunciation of an *obiter dictum*. "Since no two cases are precisely alike, the decision of a particular case may partly turn upon reasons which are suggested to the judge by its specific peculiarities or differences. And that part of the decision which turns on those differences (or that part of the decision which consists of those special reasons) cannot serve as a precedent for subsequent decisions." This is not an accurate account of the doctrine of precedent: it is precisely the "special reason" which, generalised, is the basis of subsequent decisions. The dicta which ignore the "peculiarities" of the case are not authoritative, since the peculiarities will serve to "distinguish" the later case from the precedent. But everything turns upon the meaning of "peculiarity."

[10] "The underlying principle . . . which forms its authoritative element is . . . the *ratio decidendi* . . . which alone has the force of law." Salmond, *Jurisprudence*, 3rd ed. (1910), p. 175, cited Goodhart, *Essays*, p. 1; Stone, *Province and Function of the Law*, p. 187.

terminology whereby *ratio decidendi* signifies the rule which is of binding authority should not be allowed, as Goodhart pointed out, to beg the question of how the rule is determined. I prefer to use the phrase with the first meaning. The second usage is one of those mixed fact-law concepts, which are convenient for describing the conclusions, but not the bases, of legal reasoning.[11] It involves a concept to which nothing real may be related: and leads to the assumption that there is always a rule of law for which a case is of binding authority. It is the proposition contained in this assumption which is the subject of Stone's criticism, not the classical theory. Using the phrase "*ratio decidendi*" to mean the rule of law propounded by the judge, the two contrasted theories are thus formulated. The classical theory is that the *ratio decidendi* of a case is binding on later judges. Goodhart's theory is that what is binding on later judges is a rule which may be logically constructed by a later judge from the material facts found by the earlier judge and from his decision of the precedent case. Simpson's thesis is that the explicit *ratio decidendi* of a case *must* coincide with the rule so logically constructed.[12]

The ambiguity of the phrase "facts of the case" is concerned with the distinction between words which refer to *classes* of facts and words which refer to particular facts.[13] The brute facts of the world [14] deal with individual men and women, particular things and unique events, but we are able to communicate with each other about them, and to deal with them ourselves, by the process of classification yielding our common nouns, our verbs, our concepts. Rules of law specify in their antecedents *classes* of facts—if any person fraudulently and without a claim of right made in good faith takes and carries away anything—cases are concerned with specific actualities—Bill Sykes animated at a particular time by a particular desire threatening a particular person. Simpson does

[11] The logic of such concepts has still to be fully surveyed. A beginning was made by Hohfeld. Stone's fallacy of circuitous reference deals with the subject. Corbin, in commenting on the definition of a contract as "a promise enforceable at law," deals with it also. He says: "Such a definition as this does not inform us as to what kind of facts will be operative to create legal rights and duties: it merely gives as a mode of describing such operative facts after we have found by other means that they do have legal operation." *Contracts* (one volume edition) 1952, p. 5. Stoljar's programme for fruitful concepts in law deals with but one aspect of the subject. He says, quite rightly: "For we must define our premises by way of concepts from which straightforward inferences can be made; and the corollary is that we must avoid such concepts which do not permit us to make deductions." "Logical Status of a Legal Principle," (1953) 20 Chicago L.R. p. 193. He also rightly adds that, "In brief, the argument is that we must choose *descriptive* concepts. . . . The reason is that a descriptive concept actually describes certain facts and situations." But being too much under the influence of the Ryle-Ayer-Williams school he contrasts descriptive concepts only with "*emotional* (or ethical) concepts . . . (which) merely label our attitudes *to* certain facts or situations." They need to be contrasted with a much wider range of concepts: and the value of equating emotional concepts with ethical concepts is doubtful.

[12] (1957) 20 M.L.R. p. 414.

[13] See more fully (1956) S.A.L.J. pp. 188 *et seq.*

[14] See (1954) 70 L.Q.R. p. 533.

not clearly distinguish these meanings when he says: "A rule of law will always be found to contain two parts: the first specifies a number of facts and the second specifies the legal result or conclusion. . . . When, therefore, a judge states a rule of law, and treats it as applicable to the case before him, the applicability must depend upon his finding that the *material* facts of that case correspond precisely to the *facts* specified in the rule." The notion of material facts of a case corresponding with facts of a rule is one which calls for analysis. Without such analysis there is ignored the whole difficulty of the process of determining under which "class-fact" concepts the particular facts of a case fall. The logical difficulties of this process form the subject-matter of Stone's analysis of the theory of precedent in relation to fallacies of the logical form.[15] The logical construction of a rule of law from the material facts of a case is a process of generalisation. Austin speaks of "general reasons . . . abstracted from the specific peculiarities of the decided . . . cases." Goodhart's distinction of material and immaterial facts is unconsciously based on the difference between "general reasons" and "specific peculiarities." He says: "The facts of person, time, place, kind or amount are presumably immaterial," but there are no such presumptions. What is true is that, in generalising, these qualities are omitted when they merely serve to distinguish between different members of the same class. But the relativity of classification to purpose is a commonplace of logical thought.

We can now more profitably consider the three propositions of Simpson's which I seek to controvert. The first is that Goodhart's arguments lead him to accept the rule of law which the judge in the precedent case has relied on as binding on later judges. This thesis depends on the contention that: "When . . . a judge states a rule of law, and treats it as applicable to the case before him, the applicability must depend upon his finding that the material facts of that case correspond precisely to the facts specified in that rule . . . it both contains the court's conclusion and the court's finding as to the material facts of the case." The fallacy in this is clear once it is realised that "application" of a rule to "facts" is the converse process to that of generalisation from particular fact to "class fact." An historical situation is a combination of particular facts. Many different general propositions "apply" to it: one can theoretically construct many different rules which will apply to the facts of a case. There is no logical reason why the specific proposition that the judge applies should be the one chosen. Each particular fact may be classified under a series of broader concepts, like the series in biological classification through species, genus, family and order. Moreover, the rule applies to a combination of particular facts even though it does not embody the

[15] *The English Judicial Achievement in Relation to Social Change and Fallacies of the Legal Form*, Chap. 7: III in *The Province and Function of the Law*.

concepts relevant to each of them: a rule referring to one class fact applies to any combination of particular facts which contains a member of the class. Thus, any one or more of the particular facts serves as a starting point for different theoretical rules.

If we look at the facts of *Donoghue* v. *Stevenson*, for example, we see that the allegation of the dead snail in the ginger beer bottle was considered material. But we may ask was this an instance of a harmful drink, or a harmful thing for human consumption, or a harmful thing for personal use, or a thing capable of any kind of harm? One of Lord Atkin's generalisations refers, in the widest terms, to any kind of harm, but this did not make it impossible for it to be argued in *Grant* v. *Australian Knitting Mills* [16] that the principle of *Donoghue* v. *Stevenson* was restricted to the manufacture of food. Again, the opaque character of the ginger beer bottle cannot be determined to be significant by any process of logic. One of Lord Atkin's generalisations makes no reference to that fact and was, of course, applicable to the facts. It must be borne in mind, moreover, that it is well-established doctrine that the "material facts" of a case are not to be found solely by reference to the rule explicitly formulated by the judge as the basis of his decision. It must not be assumed that because a judge propounds a rule which does not incorporate a particular fact then that fact has been considered by him to be immaterial. A judgment has to be read *secundum subjectam materiam*. If the speeches in *Donoghue* v. *Stevenson* had made no reference, in the discussion of "law," to the opaqueness of the ginger beer bottle, nevertheless later judges would have been entitled to regard that fact as material, and to limit a general doctrine of liability to a consumer for negligent manufacture by the qualification of absence of intermediate inspection. But both a qualified and an unqualified doctrine of liability apply to the facts of *Donoghue* v. *Stevenson*.[17]

The recent case of *Alsey Steam Fishing Co.* v. *Hillman* [18] serves as another example of the distinction between a judge's statement of a rule of law and his finding of material facts. Willmer J. decided the case on the authority of *The Stonedale (No. 1)* [19] saying:

[16] [1936] A.C. 85. Action against a manufacturer of clothing for dermatitis contracted as the result of wearing his products.

[17] Stone makes a similar analysis of *Donoghue* v. *Stevenson* for the purpose of showing that there is no single general proposition uniquely related to the facts of a case: *Province and Function of Law*, p. 187. He does not, in his theoretical analysis, note the distinction between "class facts" and particular facts, though his analysis of the case presupposes it. His logical reasoning is based on the applicability to a combination of facts of a rule referring to one or more of them. "If there are ten facts, as many general propositions will explain the decision as there are possible combinations of those facts." A fuller theoretical analysis of the process of applying law and facts will be found in my "Law Making and Law Applying" (1956) South African L.J., p. 157, particularly at pp. 189 *et seq.*

[18] [1957] 1 All E.R. 97.

[19] [1956] A.C. 1.

"The decision of the House of Lords in that case is directly in point here." In *The Stonedale* shipowners sought a declaration that they could limit their liability under section 503 of the Merchant Shipping Act, 1894, in respect of a claim brought by the Manchester Shipping Canal Company under the statute governing the canal for the expenses of raising their barge which had sunk in the canal as a result of improper navigation. The declaration was refused. Many rules could be constructed from the "material facts" of the case as "explanations" of the refusal. One rule, for instance, would say that section 503 did not apply to claims by the Manchester Shipping Canal Company under the canal statute. What Willmer J. did, however, was to turn to the "leading speech, with which all the other members of the House agreed, delivered by Viscount Simonds" in the House of Lords. He noted the passage, dealing with the terms of section 503 which dealt with liability of shipowners in respect of loss caused by improper navigation of their ships, which said: "The relief given to shipowners is in respect of their liability to damages and nothing else." He went on to show that this principle was the basis of the refusal by the Lords to give a declaration in respect of a claim which was not one for damages for negligence. This principle, he said, was binding on him, and he applied it to the facts of *Hillman's* case. In that case the shipowner sought to limit his liability to the owner of a tug which was sunk by the improper navigation of the ship while on tow. The tugowner brought an action based on tort to which it was held section 503 applied. He also brought an action based on the towage contract to which it was held section 503 did not apply. The rule of law propounded by the House of Lords in *The Stonedale* was the interpretation placed on section 503. The "material facts" of the case were many; it would be unhelpful to say that they were merely the instance of the negative concept of "not giving rise to a claim to liability in damages for loss by reason of improper navigation of a ship." To define "material facts" as those referred to by the judge in pronouncing a rule of law is to argue in a circle and to reduce Simpson's thesis to a tautology. It is also to depart from the meaning which Goodhart placed on his user of the phrase.

This analysis of *Hillman's* case corresponds with that made by Lord Evershed M.R. in *Wood* v. *Wood* [19a] of the case of *Bragg* v. *Bragg*.[20]

It is convenient here to indicate the nature of my agreement with Simpson in his criticism of Goodhart. Goodhart's article asserts in the first part that the judge's actual reasoning may be ignored in determining what is the rule of law established by the case. In the second part, however, he asserts that the later judge must take into account the precedent judge's statement of what

[19a] [1957] 2 All E.R. at pp. 21I to 22G.
[20] [1925] P. 20.

facts are to be considered material. But the judge's statement of what facts are to be considered material is part of his actual reasoning. Where a judge does not explicitly pronounce the rule upon which he bases his decision, but explicitly says what facts he considers material, then we may have an implicit *ratio decidendi*, which, according to Goodhart's second part, must be followed, though from the first part of his article one is led to believe that he does not consider any *ratio decidendi* as binding.[20a]

The second thesis I controvert is that the classical theory is not distinguishable from Goodhart's theory. Both this thesis and the first depend on the same argument, *viz.*, that when a judge pronounces a rule of law as the basis of his decision he enunciates the material facts of the case. Since this is not true it follows that there is a distinction between the rule of law which a judge may happen to propound, and a rule constructed from the material facts of the case and the decision on them, though, of course, in some cases the pronouncement may coincide with the construction.

The last thesis to be controverted is that Stone's criticism in *The Province and Function of Law* is directed against the classical theory. It is not. His criticism is indeed directed against what he calls "The English theory of precedent," which he finds formulated by Goodhart, Gray and Salmond.[21] He nowhere criticises the classical theory, since he nowhere refers to it. The theory he criticises is one which, he says, "imports that the particular decision is explained by a *ratio decidendi*, or a general principle of which the particular decision is an application, and which is 'required' or 'necessary' to explain that particular decision."[22] His criticisms are not applicable to an explicit *ratio decidendi* for that is a specific actualisation of one of the possibilities whose logical existence makes the legal category of *ratio decidendi* (in the second sense of the term) one of indeterminate reference.[23] Moreover, they are not fully applicable even to an implicit *ratio decidendi*, for attention to the actual reasoning of the judge negates many of the possibilities which are logically demonstrable.

My final disagreement with Simpson is concerned with his description of my article as contrasting the classical theory with the Goodhart theory. This is to contrast a genus not with another genus but with a species of another genus. Goodhart's theory, as indeed I indicated, and Stone points out, is but one of the class of theories which assert that the rule of law for which a case is of binding authority is not one which is pronounced, explicitly or implicitly, by the judge in the precedent case, but which is constructed by later judges. This latter theory has been for some

[20a] I use *ratio decidendi* with the first of the meanings set out above, *viz.*, in the sense of the rule propounded by the judge.

[21] p. 187, n. 218. Not one of the three authors is English.

[22] Stone, *Province and Function of Law*, p. 187.

[23] Of course his criticism may apply to the vagueness of legal language with its consequences of multiple reference, circuitous reference, etc.

time dominant in English juristic theory. I have contended that it does not correspond with current judicial practice. Support for this juristic doctrine may, however, be found in some recent dicta as well as in past practice.[24] In my earlier article I contrasted the two general theories. My present purpose is to indicate that there is a substantial difference between the theory which says the actual reasoning of a judge is binding, and one which says it may be ignored! This may be very well illustrated by reference to the doctrine of *Tulk* v. *Moxhay*. The rule in *Tulk* v. *Moxhay* cannot be found in the case itself[25]: it is the product of later judicial construction. The principle on which the case was decided was the doctrine of notice: an injunction was decreed against the defendant because he had taken the land with notice of the restrictive covenant he proposed to ignore. But in the course of judicial development the courts evolved as the doctrine, which is still called the doctrine of *Tulk* v. *Moxhay*, one which based the right to an injunction on a number of facts, other than that of notice, which were discerned as being present in the leading case. In this way they arrived at the requirements that the covenant must be negative, that there had to be a dominant and servient tenement, and that there had to be annexation of the covenant to the lands.[26] This was, indeed, to explain *Tulk* v. *Moxhay* by reference to facts which no one in the case had regarded as material.[27] Thus, the development of the rule in *Tulk* v. *Moxhay* does support the theory that the actual reasoning of a judge can be ignored, though it does not support Goodhart's theory that a later court is affected only by what the earlier judge thought were the material facts. It is clear, moreover, that though there may be still room for discussion as to which theory correctly describes English law today, there is a great difference between the classical theory of precedent and the theory which permits cases to be

[24] The best known dictum opposed to the "classical" theory is that of Jessel M.R. in *Osborne to Rowlett* (1880) 13 Ch.D. at p. 785: "It is not sufficient that a case should have been decided upon a principle if that principle itself is not a right principle . . . and it is for a subsequent judge to say whether or not it is a right principle, and, if not, he may himself lay down the true principle." An interesting dictum of Denning L.J. impliedly asserting that a case may still be "explained" by reference to some principle other than that upon which it was decided is in *Jess B. Woodcock & Son, Ltd.* v. *Hobbs* [1955] 1 All E.R. at p. 448 H: "Counsel for the plaintiff company said that those three cases were to be explained as cases of collusion: but they were not put on that ground and I do not think it is the correct explanation. . . . The true explanation is, I think, the ground taken by the judges."

[25] (1848) 2 Ph. 774.

[26] It is now law that a purchaser can snap his fingers at a covenant of whose existence he was fully aware. Notice is only material insofar as a purchaser of a legal estate without notice of a restrictive covenant cannot be bound by it (in the absence of registration).

[27] Such a procedure is castigated by Hamson. "It is making nonsense of case law to hold that the 'true reason,' so far from being the expressed *ratio*, was some principle to which nobody on the case adverted." (1937) 53 L.Q.R. at p. 123. This statement was made in reply to a comment by Landon (1936) 52 L.Q.R. 478.

explained by principles other than those propounded by the judge. According to the classical theory the purchaser of an equitable estate would not be bound by a restrictive covenant of which he had no notice: it is only because the classical theory has not been applied to the case of *Tulk* v. *Moxhay* that he is bound.[28]

J. L. Montrose.*

[28] There is no actual "decision" to this effect: but there is the established juristic view. See Cheshire, *Modern Real Property* (8th ed.), p. 299. In view of the uncertainty inherent in the doctrine of precedent I would not be surprised by a contrary decision.

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THE FIRST JUDGMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN COAL AND STEEL COMMUNITY

The Court of Justice of the European Coal and Steel Community has only been in existence for just over four years, and the first judgment was delivered in December, 1954. Nevertheless, since that date nearly one dozen cases have been decided, and many fundamental points of law discussed. It is felt, therefore, that because the law of the Community is still being developed, a consideration of the direction that this development is taking is of particular importance. This article, after a very brief survey of the structure of the Community and of the court attempts to consider the court's interpretation of the principles that it has had to apply. At the end will be found a survey of eight of the more important judgments of the court as many of these are not readily available in this country.

By the fifty-year Treaty signed on April 18, 1951, by France, Western Germany, Italy and the three Benelux countries the control of the European Coal and Steel Community was placed in the hands of nine directors who were jointly to form the High Authority. Eight of these directors were appointed for six years by the common agreement of the member States and these eight co-opted a ninth. Before taking many of the more important of its decisions the High Authority is required either to consult with the special Council of Ministers, or in certain circumstances to obtain the Council's consent. This Council is composed of six ministers, one appointed by each of the six Governments. The role of the shareholders' meeting with its cherished right of dismissing directors, is taken by the Common Assembly, a body composed of seventy-eight persons, eighteen appointed by the Governments of the three major countries, France, Germany and Italy, ten each by Belgium and The Netherlands and four by Luxembourg.[1]

Finally, over these three bodies and over the entire Community stands the Court of Justice. This is composed of seven members, elected for a period of six years by the Governments of the member States. There is no requirement that any of the judges should be of the nationality of the member States of the Community nor is there any limit upon the number of judges who may be elected from one particular State. The President of the court, Signor Pilotti, is an Italian; of the other judges one is French, one German,

[1] There is provision in Article 21 of the Treaty for these persons to be elected by direct universal suffrage from each State but no country has yet adopted this method.

two are Dutch, one is Belgian and one comes from Luxembourg.[2] It is interesting to note that one judge, Heer Serrarens, is not a lawyer but a trade unionist well known on the Continent for his work for international trade unions.

The jurisdiction of this court is extremely diverse, for in some respects it is international, in others administrative, in others civil and in others criminal.

Thus, any dispute between the member States concerning the application of the Treaty if it cannot be settled by any other procedure provided in the Treaty may be submitted to the court without special agreement between the States. Again, any of the administrative decisions of the High Authority, the Council of Ministers or the Common Assembly may be challenged upon the same grounds as an administrative decision can be challenged before, for example, the French *Conseil d'Etat*. Again, any party may claim damages against the Community for an injury suffered as a result of *une faute de service* committed by the Community. Yet again, some form of criminal jurisdiction is conferred upon the court by the provision that it may remove any member of the High Authority who is found by the court to have committed a serious wrong.[3]

To conclude this preliminary survey, two important matters must be mentioned. First, that unlike the International Court of Justice at The Hague, there is no provision enabling any State to appoint an *ad hoc* judge if one of its own nationality should not be a member of the court. Further, if the court decides to divide itself into two chambers, no State can require that a judge of its nationality should be a member of the chamber to which its action is allotted, even if such a judge is a member of the court.

Secondly, and again unlike the International Court of Justice at The Hague, the provisions for the enforcement of the judgments of the Coal and Steel Court are extremely effective. By Article 86 of the Treaty, every State has undertaken to carry out the terms of a judgment so that the obligation to do so is imposed upon the States by the Treaty itself and not by the court. By Article 88, if the High Authority considers that a State has failed to carry out one of the obligations imposed upon it by the Treaty, it is required to specify this failure in a reasoned decision and grant that State a reasonable time to comply with the obligation. If the State should fail to do this, the High Authority, with the agreement of two-thirds of the Council of Ministers, may fine that State by withholding moneys due to it from the High Authority.

[2] The court comprises in order of seniority Massimo Pilotti, Italy, P. J. S. Serrarens, The Netherlands, Otto Riese, Germany, Jacques Rueff, France, Louis Delvaux, Belgium, Charles Leon Hammes, Luxembourg, Adrianus van Kleffens, The Netherlands.

[3] For a full analysis of the competence of the court, see Valentine, *The Court of Justice of the European Coal and Steel Community*, pp. 56–143.

Further, it may authorise the other five States to take measures to end the common market in coal and steel *vis-à-vis* the defaulting State. Thus, by such weapons as tariff barriers, State subsidies and import quotas the products of the defaulting State can be priced out of the market. In effect there is authorised a return to that economic hostility that existed in the bad old days of 1950.

Article 33 of the Treaty

As Article 33 of the Treaty is the most important of all the articles granting competence to the court and the one that has been most discussed in the cases, paragraph 1 of that Article is here set out in full.

"The court is competent to pronounce upon appeals for annulment on the grounds of incompetence, violation of a substantial procedural requirement, violation of the Treaty or of any rule of law concerning its application, or *détournement de pouvoir*, brought against the decisions and recommendations of the High Authority by one of the member States or by the Council. However, the examination of the court may not take into consideration the situation resulting from the facts or economic circumstances in view of which the said decisions or recommendations were taken, unless the High Authority is charged with having committed a *détournement de pouvoir* or of having patently misconstrued the provisions of the Treaty or any rule of law concerning its application."

It is clear from this paragraph that member States and the Council are granted four grounds of appealing against decisions and recommendations of the High Authority. It is not stated, however, whether when only some and not all of these four grounds are pleaded, the court is limited to considering merely those particular grounds or whether it can annul a decision upon a ground that has not been pleaded.

This point first arose in *The Italian Government* case where the plaintiffs only pleaded violation of the Treaty and *détournement de pouvoir*. The court, however, did not regard itself as being bound by the pleadings and, of itself, examined the question whether there had been violation of a substantial procedural requirement.[4] This, however, is in conflict with the statement of the court in the *Groupement des Industries Luxembourgeoises* case where the court stated: "In the present dispute, plaintiff reproaches the High Authority neither with having committed a *détournement de pouvoir* nor with having obviously misinterpreted the provisions of the Treaty . . . the court must therefore limit itself to examine

[4] Art. 33, para. 1 of the Treaty is open logically to three interpretations: that the four grounds specified are the only four upon which an appeal can be brought, or that they are the only four upon which a decision or recommendation can be annulled by the court regardless of the grounds of appeal, or that both the appeal and the annulment are limited to these four grounds.

whether, as regards the law, the price increase . . . violates the Treaty or any rule of law relating to its application." [5]

In the second sentence of the paragraph, the court is granted wide powers when *détournement de pouvoir* or a patent misconstruction of the Treaty is alleged. It fell to be decided, therefore, whether a mere allegation of either of these grounds was adequate to confer these powers upon the court or whether the allegation had to be substantiated, and if so to what extent. In *The Netherlands Government* case the court held: "It is not required that the . . . argument should be fully proved before the court can start such an examination, because if such proof were given, annulment on the ground of violation of the Treaty would already have to be pronounced on this ground . . . it is required and also sufficient that the argument be supported by indications from which it can follow that the argument is well founded." [6]

As by Article 33 it is only decisions and recommendations of the High Authority, and not, for example, *Avis* which can be challenged, the court has had to determine what constitutes a decision within the meaning of the Article. The only assistance given by the Treaty is that decisions are to be supported by reasons for their enactment [7] and that decisions impose obligations.[8]

This question arose in *The Fédération Charbonnière de Belgique* case where the plaintiffs sought the annulment of a letter sent by the High Authority to the Belgian Government, which the plaintiffs alleged constituted a decision. By paragraph 2 of this letter the High Authority stated: "It is recognised . . . that the assistance granted to Belgian coal mines by way of compensation must be accompanied by a series of measures which the Belgian Government is required to take. The High Authority believes, especially, that the revision of compensation must be made conditional upon action by your Government in the manner set out below." There then follows a list of four things that the Belgian Government is required to do. These include in sub-paragraph (a) the granting of special credit facilities to enterprises by a reduction of interest rates and by a State guarantee: (b) the facilitating of short term credits: (c) the financing of construction or the extension of facilities in the mines: (d) the withdrawal, in agreement with the High Authority, of compensation from inefficient mines.

The court's decision upon the legal nature of this letter was as follows. It stated: "In its letter of May 28, 1955, the High Authority admitted that the compensation payments must be accompanied by a series of measures to be taken by the Belgian Government; the High Authority considers, furthermore, that the

[5] *Official Gazette*, July 10, 1956, p. 214. The plaintiffs, however, in their pleadings had not stated on which of the four grounds they were basing their appeal. This stilted and often inaccurate English is typical of the reports of the cases in the *Official Gazette*.

[6] *Official Gazette*, March 28, 1955, p. 131.

[7] Art. 15, para. 1.

[8] Art. 14, para. 2.

Belgian Government should take four measures specified in paragraphs (a), (b), (c) and (d). The measures provided under (d) are therefore included in the series of measures which the Belgian Government must take if necessary. In this way the High Authority determined unequivocally what its attitude shall be in case the conditions provided for in paragraph 2, sub-paragraph (d), of the letter were to be fulfilled. In other words, the High Authority established a rule which can be applied if necessary. It must therefore be considered as a decision in the sense of Article 14 of the Treaty." [9]

The court, while knowing by Article 14 that a decision requires a specific line of action, has accepted the converse of this, namely, that anything which requires a specific line of action is a decision.

The question has arisen of what is to occur when an action has been brought under Article 33 against a decision but before the hearing, or before the judgment, that decision has been repealed by the High Authority. This situation occurred in both *The Assider* and *The I.S.A.* cases, for of the decisions of the High Authority that were there challenged one had already been declared illegal by the court in *The French Government* case and the other had been repealed by the High Authority. In the event, although the court accepted the validity of the grounds of appeal in these two cases, both plaintiffs were penalised by being required to bear the costs of their actions.

A slightly different situation occurred in the *Groupement des Industries Luxembourgeoises* case. Here, the plaintiffs sought the annulment of an implied decision of the High Authority that refused to declare a decree of the Luxembourg Government, dated March 8, 1954, allowing a tax to be placed upon imported coal, as being in violation of the Treaty. Before the pleadings in the case were closed the Luxembourg Government had repealed this particular decree. The court, however, held that in this case the plaintiffs had an interest in the continuance of the action because they have suffered financially during the period that the decree was in force, so that the validity of the decree was still relevant to the question of damages.

Violation of a Substantial Procedural Requirement

The Treaty sets out that before the High Authority may take certain decisions it is to consult the Council of Ministers and sometimes it is required to obtain their consent. There is no authority yet on the question whether a failure, for example, to consult the Council would vitiate a subsequent decision because there had been a breach of a substantial procedural requirement, or whether the grounds for annulment would be violation of the Treaty —which requires this consultation—or incompetence on the part of

[9] *Official Gazette*, September 24, 1956, p. 304. Art. 14, para. 2, states: *Décisions sont obligatoires en tous leurs éléments.*

the High Authority, on the grounds that only after consulting the Council has the High Authority the legal power to issue the particular decision.

In *The Netherlands Government* case, the plaintiffs alleged that the decision that they were challenging had been passed in violation of a substantial procedural requirement because the decision did not adequately set out the reasoning that had required the decision to be taken whereas, they declared, Article 15, paragraph 1, of the Treaty provides that decisions shall be supported by reasons.

The court, while tacitly assuming that a complete failure to give reasons for a decision would amount to a violation of a substantial procedural requirement, stated that Article 15 " when interpreted in a reasonable way required the High Authority to mention in the preamble to the decision those essential elements of the factual situation which legally justify the measure in question," but that the particular goal to be attained did not need to be specified.

This is a perfectly acceptable statement as regards decisions that are published; an interesting situation arises, however, when, as will be seen below, an appeal is brought against not an actual but an implied decision of the High Authority. By Article 35, if the High Authority is under a duty or is empowered to take a decision, and after being requested to do so it does not comply with that request within two months, the Authority is deemed to have passed a decision refusing to take action, and against this implied decision an appeal is open on any of the four grounds set out in Article 33.

In the *Groupement des Industries Luxembourgeoises* case such a situation arose and the plaintiffs sought to have an implied decision annulled on the grounds that there had been a violation of a substantial procedural requirement as no reasons for the implied decision had been given.

The court clearly accepted that there was substance in this argument but rejected it because the decision that the High Authority was being required to take was one declaring that the Luxembourg Government was in breach of the Treaty by having passed the Decree of March 8, 1954. The situation arising when the Treaty has been broken is governed by Article 88, which sets out that when the High Authority deems that a State has failed in one of the obligations imposed upon it by virtue of the Treaty, it shall take note of this failure in a reasoned decision. The court deduced from this that " nothing in Article 88 allows the conclusion that the same obligation exists with regard to a refusal to take a decision on the grounds of that article. Consequently the absence of motivation of the implicit negative decision does not constitute a violation of Article 88 of the Treaty."

Although this may be correct, it is suggested, however, that because it is stated in Article 15 that decisions are to be supported by reasons, this implied decision not being so supported was a

breach of that article and should therefore have been annulled. If this Article does apply, however, one reaches the logical but absurd position that every two months' silence on the part of the High Authority is turned by the Treaty into an implied decision that is not supported by reasons and, therefore, always open to be annulled.

Détournement de pouvoir

The term "*détournement de pouvoir*" is one that has for long been accepted and understood on the Continent, and is one which, as its name suggests, finds its origin in the French legal system.[10]

It is accepted that for an act to be susceptible of annulment on the ground of *détournement de pouvoir* it must be shown that the act in question was the exercise of a discretionary power; the purpose for which that power was conferred must then be established, and it must be determined that the purpose actually pursued was a different one.[11]

One difficulty that the court has had to face when applying this principle is that of determining the position when the reasons for taking a particular decision are various, and some of these reasons are authorised and some are illegal. On this the court in considering the charge of *détournement de pouvoir* in *The French Government* case made the following very important pronouncement: "Even if," it declared, "among the motives which do justify the action of the High Authority there had been an unjustified one, namely the preoccupation to avoid sanctioning guilty enterprises, the decisions would not because of that be vitiated by *détournement de pouvoir* inasmuch as they do not infringe upon the essential objective which is the prohibition of the unfair competitive practices and discriminations." [12]

Détournement de pouvoir, however, besides possessing this particular meaning, is a term in Italian administrative law which has a wider connotation. Thus, the Italian *Consiglio di Stato* has recognised both *illogicita manifesta* and *manifesta ingiustizia* as a form of *eccesso di potere*.[13] Thus the *Assider* alleged that the complicated system of reporting price deviations which was required of enterprises by Decision 3–54 was an example of *illogicita manifesta*, and that the authorisation of price deviations by

[10] Art. 33 also virtually reproduces the Italian formula of *incompetenza, eccesso di potere* and *violazione di leggo*.

[11] See further R. Laun, *Bemerkungen zum freien Ermessen und zum "détournement de pouvoir" im Staatlichen und in Völkerrecht* in *Festschrift für Herbert Kraus anlässlich seines 70 Geburtstages*.

[12] *Official Gazette*, January 11, 1953, p. 22. It is not thought valuable to speculate upon the possible application of the general principle that may be abstracted from this statement or to consider what is the meaning of the term "infringe upon the essential objectives"—*ne portent pas atteinte au but essential*.

[13] See S. Galeotti, *The Judicial Control of Public Authorities in England and Italy*, pp. 147 and 150.

Decision 2–54, which the plaintiffs alleged had been passed to avoid the necessity for sanctions being imposed upon defaulting enterprises, was manifestly unjust.[14]

It would appear that because the terms of Article 33 must apply equally to all the countries of the Community an appeal under the head of *détournement de pouvoir* on the grounds of *illogicita manifesta* or of *manifesta ingiustizia* must be open even to plaintiffs governed by a municipal law that does not recognise these grounds. A new body of unified European law which is the aggregate of European national laws may thus tend to be developed.

As paragraph 1 of Article 33 sets out *détournement de pouvoir* together with incompetence and violation of the Treaty as grounds upon which States, etc., may appeal, it is clear that a distinction between these three grounds was intended. What this distinction is, however, becomes very hard to determine as the decisions of the court accumulate. An example will illustrate this.

One of the grounds on which the Italian Government sought to have Decision 2–54 annulled was that it had been passed without section 30 (2) of the Convention on Transitional Provisions having been taken into consideration, so that the Decision was in violation of the Treaty. This argument was accepted by the court and Article 1 of that Decision was annulled.

The *Assider* and the *I.S.A.* in lodging their appeals were prevented, by Article 33, paragraph 2, from alleging violation of the Treaty, and were limited to the sole ground of *détournement de pouvoir*. Consequently, the plaintiffs alleged that the High Authority had passed Decision 2–54 without taking section 30 (2) of the Convention into consideration so that the Decision was thereby vitiated—but they called this defect a *détournement de pouvoir*. Because Decision 2–54 had already been annulled by the court in an earlier case the force of this argument was not considered by the court, but it was clearly accepted as prima facie valid both by the defendants and by the court.[15]

That plaintiffs on the Continent have doubts about the meaning of *détournement de pouvoir*, or at any rate doubts about the difference between this and the other grounds of appeal open to them under Article 33, is illustrated by an argument brought forward by the *Fédération Charbonnière de Belgique* in its action against the High Authority, where the plaintiffs argued that it was open to them to prove incompetence, violation of the Treaty and a breach of a substantial procedural requirement as grounds upon

[14] It is interesting, however, to note that these two contentions are put forward by the plaintiffs, and accepted by the court, as being specialised examples of *sviamento di potere—détournement de pouvoir*—and not of *eccesso di potere*.

[15] The court declared: "As for Decision 1–54 of the High Authority, the plaintiff has put forward the same grounds as the Government of the Italian Republic in the case *Italian Government* v. *The High Authority*." The sole ground, however, that was actually put forward by the Italian Government was violation of the Treaty.

which they could establish that there had been a *détournement de pouvoir*.[16] The contention was, of course, rejected.

That the court itself is not clear about what meaning it attaches to the term *détournement de pouvoir*, and thus unable properly to distinguish it from some of the other grounds of appeal in Article 33, is to be seen from the quotation from *The Netherlands Government* case that has already been set out, where the court stated: "It is not required that the argument [to support an allegation of *détournement de pouvoir*] should be fully proved before the court can start an examination [under Article 33, paragraph 1, sentence 2] because if such a proof were given, *annulment on the ground of violation of the Treaty* would already have to be pronounced on this ground." [17]

It would appear, therefore, that the question of which ground of appeal is advanced under Article 33 has become more a matter of words than one of substance.[18]

The Meaning of the Term "Patent Misconstruction of the Treaty"

By the second sentence of paragraph 1 of Article 33 the court is granted wide powers to assess the situation resulting from the facts or economic circumstances in view of which the particular decision or recommendation of the High Authority was passed. Apart from an allegation of *détournement de pouvoir*, an allegation that there has been a patent misconstruction of the Treaty is also adequate to confer this power upon the court.

However, the only occasion when the term "patent misconstruction of the Treaty" has arisen for consideration was in *The Netherlands Government* case. Here the plaintiffs were seeking to establish that there had been a patent misconstruction of the Treaty on the part of the High Authority by showing first, that the power of the High Authority to impose maximum prices is limited [19] to those occasions where such prices are necessary, *inter alia*, to establish the lowest prices then possible,[20] and, secondly, by asserting that from a study of the conditions of the common market as it existed at the time of the fixing of those maximum prices it was clear that this objective would not be achieved.

The court declared: "The word 'patent' supposes that the

[16] *Official Gazette*, September 24, 1956, p. 305. This contention is the more interesting as Belgium possesses a *Conseil d'Etat*—in fact the *Exposé des Motifs* issued by the Belgian Government concerning the Coal and Steel Treaty stated that the court was "predominantly administrative and similar in many ways to our *Conseil d'Etat*." See *Sénat de Belgique, Session Ordinaire*, 1950–1951, No. 369, p. 14.

[17] *Official Gazette*, March 28, 1955, p. 131.

[18] It may be useful to note that the definition of *détournement de pouvoir* advanced by the High Authority is "an administrative act objectively in accordance with the rule of law but subjectively vitiated because of the aim pursued by the administrative authority"—see *The Fédération Charbonnière de Belgique* case, *Official Gazette*, September 24, 1956, p. 295.

[19] Art. 61, para. 1 (*a*) of the Treaty.

[20] Art. 3 (*c*) of the Treaty.

provisions of the Treaty have been misconstrued to such an extent that this misconstruction seems to follow from an evaluation of the economic situation which led to the decision and which evaluation is obviously wrong when seen in the light of the provisions of the Treaty." [21] This, it is suggested, is unexceptionable. However, the court then continued: "In the present case the existence of patent misconstruction can only be accepted if the court ascertains that an economic situation exists from which it follows, at first sight, that there was obviously no necessity for taking the decision in question for the achievement of the objectives described in Article 33 of the Treaty, more in particular under section (*c*) of that Article."

This, however, is not an application of the definition of patent misconstruction given immediately before. By the definition the court has stated that patent misconstruction occurs where the existing situation, X, is evaluated—*appréciée*—by criteria believed to be those stated in the Treaty but which are patently not so. The court, nevertheless, then states that in the present case its duty is to see whether the existing situation was other than the one justifying action—*i.e.*, that the situation was Y, and not X. To read situation Y as situation X, it is suggested, is not a misconstruction of the Treaty but a misconstruction of external facts, which is clearly very different.

Article 33, paragraph 2

The second paragraph of this important Article has also been the basis of much argument in the court: the wording of the paragraph is as follows:

> "The enterprises and associations set out in Article 48 may bring, under the same conditions, an appeal against individual decisions and recommendations that concern them, or against general decisions and recommendations which they deem vitiated by *détournement de pouvoir* with regard to them."

It is in fact only paragraph 3 of Article 48 that is relevant to this provision and this sets out that to obtain necessary information or to facilitate the execution of the tasks allotted to it, the High Authority shall normally have recourse to associations of producers provided either that the associations assure to qualified representatives of workers and to consumers participation on their boards of control or on the consultative committees attached to them or that they grant by any other means a satisfactory place within their organisation for the expression of the interests of workers and consumers.[22]

[21] *Official Gazette*, March 28, 1955, p. 131.

[22] The term "enterprise" is defined by Art. 80 of the Treaty as applicable, except in the special cases governed by Arts. 65 and 66, to all enterprises producing coal or steel within the territories of the High Contracting Parties.

Although paragraph 2 of Article 33 appears to grant a right of appeal to all enterprises without restriction, in the *Groupement des Industries Luxembourgeoises* case, the Luxembourg Government, as an intervening party, disputed the plaintiff's right to bring that case before the court because the action solely concerned an implied decision of the High Authority concerning coal, and the Government sought to contend that only an enterprise producing coal or an association of such enterprises was entitled to appeal to the court for the annulment of such a decision. As the plaintiffs produced steel and not coal the Government alleged that they had no standing before the court. This proposition, however, was rejected by the court on the grounds that "there is no provision in the Treaty requiring the specialisation of the producer to be connected with the speciality of the dispute." [23]

Concerning associations, however, the court has held [24] that in addition to the restriction imposed by Article 48, it is only associations of enterprises in the sense given to the term enterprise by Article 80 of the Treaty that may bring an appeal: indeed, the court added: "If it were not so one would admit for an association a competence to introduce proceedings while this competence could not be exercised individually by the constituting members themselves." [25]

The terms "individual decision" and "individual recommendation" are nowhere defined in the Treaty, but the court has already had to give a ruling upon the meaning of these terms.

In the *Fédération Charbonnière de Belgique* case the plaintiffs were requesting the annulment of a decision of the High Authority which lowered the prices of certain grades of coal produced in Belgium.[26] The plaintiffs argued that this was an individual decision for by it the three collieries of the Campine were affected differently from the other Belgian coal mines. The court declared, however, that the decision "refers to the enterprises on the sole basis that they produce coal and not on any other requirement. If a new coal deposit was discovered in Belgium, the operator would be bound to sell at the prices fixed by the decision. On the other hand, the territorial limitation does not imply any individual specification and is justified by the fact that the Belgian industry needs the compensation payments." A little later the court stated: "The fact that plaintiff is an association including all the enterprises referred to in the decision—and only those—does not lead to a different result. Because if it were otherwise,

[23] *Official Gazette*, July 10, 1955, p. 207.

[24] *The Groupement des Industries Luxembourgeoises* case. *Official Gazette*, July 10, 1955, p. 235.

[25] Although the court was here only referring to the term "association" in Art. 35, the meaning of the term must be the same in Art. 33.

[26] Art. 1 of Decision 22–35 states: "For grades of coal set out in the Schedule annexed to this Decision, coal producing enterprises in the Belgian basin must comply in sales on the common market with the prices therein specified." No enterprise is thus mentioned by name.

the general nature should be denied even to a decision applicable to all the enterprises of the Community in the eventuality of a single association including all those enterprises."

Finally, paragraph 2 of Article 33 allows enterprises and associations to appeal against general decisions and recommendations which they deem vitiated by a *détournement de pouvoir* with regard to them. The meaning of the words "with regard to them"[27] has caused a certain difficulty. The High Authority maintained[28] that they must be interpreted in the sense that the decision in question must be a disguised decision, that is to say, a decision which although general in appearance, in reality only affects one or more enterprises. This, however, was not accepted by the court. "A disguised individual decision," the court declared,[29] "remains an individual decision, as the nature of a decision does not depend upon its form, but upon its scope. Furthermore, such an interpretation of Article 33 and particularly of the words "affecting them" has no other meaning than the one of the words that express it, *i.e.*, that it concerns an enterprise which is the object, or at least the victim, of the *détournement de pouvoir* which it brings forward. The court is of opinion that Article 33 clearly says that associations and enterprises can contest not only the individual decisions but also the general decisions in the real sense of the word."

Article 33 governs appeals against express decisions and recommendations of the High Authority, whereas Article 35, as has already been briefly mentioned, governs the situation where the High Authority is either required or empowered to take a decision or recommendation. The Article then goes on to state: "If, at the end of a period of two months, the High Authority has not taken any decision or formulated any recommendation, an appeal may be brought before the court within one month against this implicit decision of refusal which is deemed to result from this silence."

The court, without any argument, has held that appeals under this provision are appeals against decisions and recommendations of the High Authority and can therefore only be brought on one of the four grounds set out in Article 33 for the bringing of appeals.

Thus in the *Groupement des Industries Luxembourgeoises* case the plaintiffs requested the High Authority to pass a decision declaring the Luxembourg Government, by failing to repeal the Ministerial Decree of March 8, 1954, to be in breach of one of the duties imposed on it by the Treaty.[30] After a silence of two

[27] *À leur égard*—translated in the *Official Gazette* as "affecting them."

[28] In *The Fédération Charbonnière de Belgique* case, *Official Gazette*, September 24, 1956, p. 245.

[29] *Ibid.*, p. 304.

[30] The Luxembourg Government was alleged to be in breach of obligations imposed upon it by Arts. 4 (*c*) and 4 (*b*) of the Treaty, and the High Authority therefore to be under a duty to take a decision by Art. 88, para. 1, of the Treaty.

months the High Authority was deemed to have passed a decision refusing to take action, and as this was declared by the court to be an individual decision,[31] the plaintiffs, by Article 33, paragraph 2, were enabled to allege any of the four grounds set out in Article 33, paragraph 1 and, in the event, they selected *détournement de pouvoir* and a violation of a substantial procedural requirement upon which to bring their case.

The pleadings in this particular case appear to reveal a new development, for the plaintiffs, apart from seeking the annulment of the implied decision of the High Authority, requested a declaration from the court that the High Authority was bound to issue a decision or recommendation annulling the effects of the Ministerial Decree. However, because the court held that the Decree did not infringe the Treaty, the court was clearly not required to make such a declaration, but the judgment makes no mention of the fact that the right to make a request for such a declaration is nowhere granted to the plaintiffs by the Treaty. If this were not, in itself, adequate to invalidate the plaintiff's request for this declaration, there is clearly no need for such a declaration ever to be issued, for if the court accepts that no duty has fallen upon the High Authority, as was the case here, then the two months' silence is not created into an implied decision. If, on the other hand, the court finds that a decision is deemed to have been implied, this means that the court has accepted that there was a duty upon the High Authority, so that again no declaration to that effect is needed.

The Judgments of the Court

The court is under a duty to publish its judgments and the general public can go to two sources to find them. First, a *Recueil de la Jurisprudence de la Cour* has been issued but so far this covers only the years 1954–1955. This volume contains the judgments and the findings of the Advocate General in six cases.[32] Secondly, as cases are decided they are reported in the *Journal Officiel* of the Community, which is published in the four official languages—Dutch, French, German and Italian. An English translation of this *Journal* now appears under the title "The Official Gazette of the European Coal and Steel Community" and it is from this that the majority of the quotations in this article have been taken.

[31] This finding of the court comes about as the result of an interesting Gilbertian situation, for it means that this fictional decision, if it had not been merely a fiction, would have been individual to the plaintiffs—but this fictional decision was later held by the court not to exist at all—even as a fiction.

[32] These cases are: *The French Government* case, *The Italian Government* case, the *Assider* and the *I.S.A.* case, *The Netherlands Government* case and the second *Assider* case. All these cases are noted below.

The Government of the French Republic v. *The High Authority*
The Government of the Italian Republic v. *The High Authority*

As both these cases have already been noted by the author in this Journal [33] there is felt to be no necessity to repeat that review.

Associazione Industrie Siderurgiche Italiane (*Assider*) v. *The High Authority*

This appeal was submitted on February 16, 1954, and sought the annulment of the same three decisions of the High Authority as did the above two cases, namely, Decisions 1–54, 2–54 and 3–54.

As these three decisions of the High Authority were general decisions, the plaintiffs were limited by Article 33, paragraph 2 of the Treaty to alleging *détournement de pouvoir* with respect to their own association. They therefore sought to substantiate a charge of *détournement* in several ways.[34]

First, they asserted that Article 60, paragraph 2 of the Treaty is seeking to prohibit discriminations whereas these decisions of the High Authority revealed a clear intention to consent to—or at least not to forbid—discriminations. Moreover, they asserted: "The challenged decisions seriously limit the publicity of the price lists with the avowed but illegal intention of permitting deviations between the actual and the prohibited prices which further accentuates the *détournement de pouvoir.*"

Secondly, and this is the same argument as the French and Italian Governments employed, it was maintained that the High Authority had admitted [35] that enterprises were not adhering to their price lists. However, rather than apply the penal sanctions provided by Article 64 of the Treaty the High Authority had sought to legalise these deviations so as to avoid the necessity for imposing fines.

Thirdly, as regards Decision 3–54—which required bi-weekly reports to be submitted—the plaintiffs affirmed that this was vitiated by *détournement de pouvoir* as it was plainly illogical and prima facie impracticable.

Finally, they relied upon the terms of section 30 (2) of the Convention on Transitional Provisions, which prohibits deviations from price lists being adopted without the consent of the Italian Government. The High Authority was alleged to have committed a *détournement de pouvoir* in that it had used its power in a way that evaded this particular safeguarding provision.

In its judgment the court pointed out that as Article 1 of Decision 2–53 had already been annulled by the judgment in *The French Government* case, the present request for annulment was

[33] (1955) 18 M.L.R. 187.
[34] The following is based upon the Statement of Claim kindly supplied to the author by the plaintiffs who have given permission for it to be published. The court itself maintains strict secrecy as regards the pleadings, etc., even after the case has been concluded.
[35] *Exposé sur la situation de la Communauté au debut de 1954.*

to that extent no longer required. Further, the appeal against Decision 3–54 was not considered by the court because that decision had been repealed by the High Authority before the delivery of the present judgment.[36]

It was then stated that the plaintiffs had advanced no new argument concerning the validity of Decision 1–54—" whatever interpretation one wants to give to the notion *détournement de pouvoir à leur égard* which appears in Article 33 of the Treaty."

The court then very briefly considered the validity of the other articles of Decision 2–54 and declared them valid.

Association " Industrie Siderurgiche Associate " (*I.S.A.*) v. *The High Authority*

This action was started on February 16, 1954, and was an appeal against the validity of the same three decisions of the High Authority as have figured in the above three cases.

The grounds upon which this action was founded were the same as those alleged by the *Assider*, except that rather than rely upon the contended illogical nature of the decisions, in the plaintiff's opinion there was " an infraction of the rules of good administration and therefore an indication for *détournement de pouvoir* in the fact that the High Authority in the motivation of the decisions in question had neglected to pronounce a judgment with regard to the dissenting opinions expressed in the consultative bodies." [37]

The argument, however, was rejected by the court on the single ground that as the Treaty does not require the High Authority to set out any dissenting opinions put forward by the consultative bodies, there clearly can be no obligation to refute them.

The text of this brief judgment is almost identical with that in the *Assider* case, and both judgments were delivered on the same day.

The Government of the Kingdom of the Netherlands v. *The High Authority*

In March, 1953, the High Authority imposed maximum prices for the sale of coal from the pit heads of the various coal basins of the Community.[38] As these prices were only to remain in force until March, 1954, the situation was reviewed in that month and the High Authority decided that in general it was no longer necessary to maintain maximum prices for all the coal basins. However, the Ruhr and the two basins of the *Houilleres du Nord* and the *Pas-de-Calais* owing to the nature and the size of their production had by then acquired a preponderant influence and were preventing effective competition. As a result, Decision 18–54 was passed ending all existing maximum prices, while Decisions 19–54 and 20–54 set

[36] Decision 3–54 was repealed by Decision 1–55 of January 4, 1955—*Journal Officiel*, January 11, 1955.
[37] *Official Gazette*, March 1, 1955.
[38] Decisions 7–53 to 24–53.

out new maximum prices for the Ruhr and the other two basins respectively.

For the annulment of these three decisions the Netherlands Government brought this action.

The plaintiffs in their pleadings alleged all the four grounds that are open to them under Article 33 of the Treaty. Their arguments may be briefly summarised as follows:

Article 61 of the Treaty authorises the High Authority to establish maximum prices where it regards them as being necessary to obtain the objects enumerated in Article 3 of the Treaty which include, *inter alia*, the establishment of the lowest possible prices—*i.e.*, by preventing them from rising further. As the plaintiffs maintained, however, that there already existed a tendency for prices to fall, the decision fixing maximum prices constituted a violation of the Treaty.

Further, it was asserted that before any of the powers given by Article 61 of the Treaty can be exercised it must be shown what specific objects set out in Article 3 would not be achieved by a failure to take the proposed action. As this could not be shown in relation to the present decisions, the Treaty was alleged to have been broken.

Next, it was declared by the Netherlands Government that the reason for imposition of maximum prices was not to achieve any of the objects of Article 3 but that it had been taken because certain coal basins had acquired a virtual monopoly. As the existence of a monopoly is directly contrary to the Treaty, this situation could not be quoted as grounds for taking the decisions. In fact, it was put forward, no action against monopolies can be taken under Article 61 at all but only by direct action under Articles 65 and 66.

Détournement de pouvoir was stated to exist and it was alleged that the High Authority was not in fact seeking to obtain the lowest possible prices as required by Article 3 of the Treaty, and that this was evidenced by the fact that the new maximum prices imposed were not significantly lower than those already existing.

Further, it was stated that if the High Authority feared that production and employment would be hindered by freeing prices this must imply a fear that prices would fall substantially. This would therefore have required minimum and not maximum prices to be fixed. It was argued that this again involved a *détournement de pouvoir*.

A violation of a substantial procedural requirement was alleged to have occurred because the decision in question did not adequately set out the reasoning that required it to be taken, whereas Article 15, paragraph 1, of the Treaty provides that decisions shall be supported by reasons—*motivés*.

The court's rejection of the alleged violation of a substantial

procedural requirement and of *détournement de pouvoir* have been set out above.[39]

When considering the allegation of the violation of the Treaty and incompetence, which were based on the charge that the existence of monopolies was itself illegal and therefore could only justify action under Articles 65 and 66 and not under Article 61, the court, without argument, declared: "The existence of a situation which can eventually justify the application of Article 66, paragraph 7, does not in itself prevent the High Authority from using the competence which is given it by Article 61 (*a*)."

Having thus rejected all the grounds of the appeal, the court dismissed the action and awarded costs to the High Authority.

M. Antoine Kergall v. *The Common Assembly*

As the court apparently is not intending to publish its judgment in this case in the *Journal Officiel* of the Community, beyond the mention in six lines that it has already received,[40] it may be desirable to make available the facts and reasoning in this somewhat surprising judgment.

On January 10, 1953, the plaintiff signed a contract with the defendants, with effect from December 6, 1952, to serve the defendants for a period of two years at an annual salary of 7,800 E.P.U. units. By Article 15 of this contract the plaintiff was to receive compensation—*indemnité*—at the end of those two years amounting to two months' salary. This Article, however, was to be replaced, *de plein droit* by *le Statut du Personnel* from the date of the adoption of that projected statute. There was no clause in the contract concerning its renewal.

On June 15, 1953, the Bureau of the Common Assembly decided to discontinue M. Kergall's post as *Chef de Service aux Services administratifs* at the end of their contract with him.

On June 16, 1953, the Secretary-General of the Common Assembly informed the plaintiff that this decision had been taken and that in consequence it would not be possible to renew his contract.

On November 3, 1954, the plaintiff was further informed that because he had so many expenses on account of his numerous family, the Assembly had decided to make him a grant equivalent to four months of his salary in addition to the two months provided for in the contract.

On November 24, 1954, the plaintiff replied that he regarded himself as being adversely affected—*qu'il s'estime lésé*—by the decision of the Assembly terminating the post he was holding and that he would therefore be submitting his case to the Court of Justice.

It appears that the Assembly then attempted to persuade M. Kergall to withdraw his threat to go to law, and when he refused

[39] See pp. 601 and 604–605.
[40] *Journal Officiel*, July 26, 1955.

to do so he was informed by the Vice-President of the Assembly that as a result of his refusal the offer of the additional grant of four months' pay was withdrawn.

M. Kergall, therefore, on January 19, 1955, started the present action claiming that the decision of the Common Assembly passed on June 15, 1953, was improper—*intervenue dans les conditions irrégulieres*—and claimed damages and costs.

Basically the plaintiff put forward four contentions to support his claim. First, that the decision of June 15, 1953, had been improperly taken in that it had been passed only a few months after the commencement of his period of office.

Secondly, that the Assembly was incompetent to take the decision, which it was alleged could only be taken by the Commission of Presidents. This argument was rejected by the court for reasons that need not detain us.

Thirdly, *détournement de pouvoir* was alleged as it was contended that the abolition of the post of *Chef de Services* was being used as a mere pretext for the plaintiff's dismissal.

Fourthly, it was argued that this failure to renew his contract amounted to a disguised punishment which further made the decision improper.

The plaintiff, however, sought not the annulment of the decision but a declaration that it had been taken under irregular circumstances and that he had suffered consequent damages.

The court after an oral hearing of both parties held that this contract was to be read in the light not only of its express terms but in the light of the Treaty, as well as the internal rules of the Common Assembly, the intention of the parties and the intention of the Community as a whole.

It was declared that the words in the contract "M. Kergall 'enters into service' with the Community" and the fact that the plaintiff was employed in a senior position justified him in believing that he would enjoy security of office.

Further, the fact that the contract was limited to a period of two years did not necessarily mean that the parties intended the contract to be merely for that period but rather that these two years "would be sufficient for the drawing up and adoption of the *Statut des Fonctionnaires.*" This interpretation was held to be supported by the fact that Article 15 of the contract—that granted compensation—was expressed to be valid only until it was replaced "*de plein droit*" by the projected *Statut.*

"Thus the plaintiff's contract of employment," the court declared, "constitutes a contract of public law. . . . It follows that the legal position of the plaintiff is that of a public employee with a provisional engagement."

The decision of the Assembly was then declared to have been taken irregularly and the Assembly held to have committed a wrong in the exercise of its function in relation to the carrying out of the

contract. The Assembly was responsible for this wrong and was therefore liable to the plaintiff.

The offer of the Assembly to pay four months' salary in addition to the two months under the contract was held to have been wrongly withdrawn, and that in addition to these six months' pay the plaintiff was entitled, " taking into account all the circumstances " to an additional year's salary.[41] He was also awarded two-thirds of his costs.

Associazione Industrie Siderurgiche Italiane (*Assider*) v. *The High Authority*

The plaintiffs in this case had already appealed to the court for the annulment of three decisions of the High Authority,[42] but, as has been seen, this action was not successful as the only one of these decisions that was invalid had already been annulled in *The French Government* case. However, one of the grounds of the plaintiffs' earlier appeal had been that the decisions were vitiated by *détournement de pouvoir* because they violated section 30 (2) of the Convention on Transitional Provisions.[43]

This provision was not referred to by the court in the earlier *Assider* judgment because it had been considered in *The Italian Government* case and had there been held as one of the grounds for annulling Decision 2–54. As that decision had already been annulled it was held that there was no need to reconsider arguments for its annulment.

In the present action the *Assider* requested an interpretation of the passage in the judgment given in *The Italian Government* case where the scope of section 30 (2) was considered. The court had stated: " In the opinion of the court paragraph 30 of the Transitional Provisions prohibits all sales in Italy below the prices provided for in the price lists." This was open to two possible interpretations. First, that it only prevented foreign enterprises from selling below their price lists in Italy, or secondly, that it also prevented Italian enterprises from selling below their own price lists in Italy. The High Authority had acted upon the latter interpretation and the *Assider* upon the former.

The court, however, held that strictly it was incompetent to determine this conflict because the court had not been concerned in *The Italian* case with the question of Italian enterprises selling below their own price lists on the Italian market, but only with the question of the validity of a decision of the High Authority that allowed price

[41] As the contractual figure of two months' salary had already been paid, the court awarded sixteen months' salary as damages.

[42] See above, p. 609.

[43] As set out above, section 30 (2) declares that the prices adopted by enterprises for the sale of Italian steel on the Italian market must not be lower than those set out in their price lists for comparable transactions without authorisation of the High Authority given in agreement with the Italian Government.

deviations throughout the Community as a whole. "In an interpretative judgment the court can only determine the meaning and the scope of a former judgment: the court cannot rule on problems which have not been settled in that judgment. Parties cannot by way of interpretation ask for a new decision in new disputes."

Notwithstanding this, however, the court felt that it was desirable in the present case to declare that *The Italian* judgment had only concerned the case of non-Italian enterprises selling in Italy and that "the problem of the alignment of the Italian enterprises with the prices of other non-Italian enterprises of the Community was not settled in that judgment."

The Groupement des Industries Sidérurgiques Luxembourgeoises v. *The High Authority*

On March 8, 1954, a Ministerial Decree of the Grand Duchy of Luxembourg authorised the *Office Commercial du Ravitaillement*, a body possessing a monopoly of importing coal and coke into Luxembourg,[44] to increase the prices of solid fuel other than household fuel, whatever its origin, sort or consumer.

As a result of this decree the plaintiffs, on July 14, 1954, forwarded a letter to the President of the High Authority requiring that Authority to take action against the Luxembourg Government to have this decree repealed as the decree was alleged to be in violation of the Treaty.

As the High Authority failed to take any action upon this letter, the plaintiffs appealed to the court for the annulment of the negative decision of the High Authority that was to be implied, under Article 35, paragraph 3, from the Authority's two months' silence. The two grounds alleged for this annulment were that the decision was in violation of the Treaty and that it had been passed without compliance with a substantial procedural requirement. The plaintiffs also requested a declaration that the High Authority was bound to decree, first, the suspension of the activities of the *Office Commercial du Ravitaillement* in so far as it was the sole importer of coal into the Grand Duchy and, secondly, the prohibition and abolition of the *Caisse de Compensation* that had been attached to the *Office Commercial du Ravitaillement* by Ministerial Decree of March 8, 1954.

The High Authority informed the plaintiffs by a letter dated November 27, 1954, that the *Caisse de Compensation* was not inconsistent with the Treaty and therefore could not be prohibited.

This letter merely prompted a second action by the plaintiffs for the annulment of the negative decision to be implied from the letter.

By a decision dated January 7, 1955, the High Authority gave the Luxembourg Government until March 31, 1955, either to repeal

[44] Luxembourg does not possess any coal mines herself.

the Decree of March 8, 1954, or to modify its conditions to make it consistent with the Treaty. Consequently, on April 2, 1955, the import tax that had been imposed by this Decree was modified, and in September of that year the whole Decree was repealed.

Those parts of the case which concerned the standing of the plaintiffs to appeal and the meaning to be attached to Article 35 of the Treaty have already been discussed. It remains here to consider the other parts of the decision.

In order to show that the implied decision of the High Authority refusing to take action to prohibit the decree of March 8, 1954, had been passed in violation of the Treaty the plaintiffs had to establish that there was a duty upon the Authority to take such a decision. This they could only do in a circuitous fashion. By Article 88, paragraph 1, if the High Authority believes that a State has broken one of the obligations imposed upon it by virtue of the Treaty, it shall set out this breach in a reasoned decision. Therefore the plaintiffs sought to show that the State of Luxembourg was in breach of one of the obligations imposed upon it by the Treaty.[45]

To establish their case the plaintiffs basically advanced two contentions. First, that the decree violated Article 4 (*c*) of the Treaty, and secondly, that it violated Article 4 (*b*) of the Treaty.

Violation of Article 4 (*c*) *of the Treaty.* Article 4 (*c*) of the Treaty sets out that special charges imposed by States of whatever form they may be are prohibited. Article 1 of the Luxembourg Decree of March 8, 1954, authorised the *Office Commercial du Ravitaillement* to increase the prices of solid fuel, other than household fuel, whatever its origin, sort or consumer. The issue turned, therefore, upon whether this increase in price amounted to a special charge.

The court noted that Article 67, paragraph 3, of the Treaty states that " if the action of a State reduces the differences in the costs of production . . . by the imposition of special charges upon coal and steel enterprises within the jurisdiction in comparison with other industries of the same country, the High Authority . . . may address the necessary recommendations to that State."

The court deduced from this provision that the term " a special charge " was being taken in the Treaty as a charge imposed upon only a fraction of the industries of a State, although the court realised that a charge that is general for all the enterprises of a State could cease to be general and be special when one considers all the enterprises of the Community. A charge was, therefore, declared to be illegal when it introduces in the distribution of production distinctions which do not result from variations of productivity and which

[45] It is interesting that in the case the point was never taken that the test set out in Art. 88, para. 1, was a subjective test requiring the plaintiffs to prove the existence of a belief on the part of the High Authority that a breach had been committed, rather than the actual breach by Luxembourg.

unequally affect the production costs of producers who are similarly placed.

Applying this definition to the present case, the raising of prices by the *Office Commercial* would constitute a special charge if only part of the enterprises in Luxembourg were affected or if the increase merely fell upon certain classes of solid fuel consumed in Luxembourg. However, the rise in prices that had occurred affected all enterprises in Luxembourg and had been imposed upon all types of fuel, other than household fuel, so that the charge was not a special charge, and was thus legal.

Violation of Article 4 (b) of the Treaty. Article 4 (*b*) of the Treaty prohibits measures and practices which establish a discrimination among producers, buyers or consumers, and discrimination is defined by Article 60 as any practice which involves the application of unequal conditions to comparable transactions within the common market.

The plaintiffs therefore argued that the raising of prices constituted a discrimination between consumers of coal in Luxembourg and consumers in the other member States.

The court, in considering this, readily accepted that the rise in prices had produced a difference between the cost of coal imported into Luxembourg and that of similar coal imported elsewhere. However, it was held that Article 4 (*b*) had to be read together with Article 67, paragraph 1, of the Treaty, and by this provision the High Authority may take action with regard to any acts of member States which have " appreciable " repercussions on the conditions of competition in the coal and steel industries, or which are liable to give rise to a " serious disequilibrium " by " substantially " increasing differences in the cost of the production otherwise than through variation of productivity.[46]

The court therefore held that the High Authority was not empowered to take any action in cases where these extreme conditions did not exist. Further, as the rise in prices had not brought about these conditions the rise was not illegal, but merely part of the general economic policy of the country which by the Treaty is expressly left in the hands of the member States.[47]

As there was thus no breach of the Treaty by Luxembourg there was no duty upon the High Authority to take action in relation to the breach, so that the two months' silence of the High Authority was not created into an implied decision, so that there was no decision existing, and thus none that could be repealed.

It followed from this finding that the second action, brought as a result of the express refusal of the High Authority to take action, also failed.

[46] The inverted commas appear in the judgment.
[47] Art. 26, para. 1, of the Treaty.

The Association des Utilisateurs de charbon du Grande-Duché de Luxembourg v. *The High Authority*

The plaintiffs in this action had written to the High Authority on July 20, 1954, requesting it to declare illegal the Ministerial Decree of March 8, 1954, that is to say they had sent a letter in the same terms as that written on July 14 by the *Groupement des Industries Luxembourgeoises*. Owing to the silence of the High Authority, the plaintiffs, on October 16, 1954, appealed to the court for the annulment of the implied decision resulting from the High Authority's refusal to act. A second appeal, " in so far as needed," was brought as a result of the High Authority's letter to the plaintiffs dated November 27, 1954, the terms of which were identical with those that have been set out in the *Groupement des Industries Luxembourgeoises* case.

As the decision being challenged and the grounds of appeal in this action and in the *Groupement des Industries Luxembourgeoises* were the same the only importance of this present case lies in the consideration given by the court to the question whether the plaintiffs had any *locus standi* before the court.

The High Authority denied that the plaintiffs possessed any standing on the ground that the plaintiffs were an association and that Article 33, paragraph 2, only allows associations as defined in Article 48 to appeal,[48] and that the plaintiffs did not fall within this definition. However, the plaintiffs sought to counter this by declaring that their action was being brought under Article 35 and that although they were appealing against a decision of the High Authority, Article 33, paragraph 2, did not apply to this appeal.

The court in its judgment declared that because it could see nothing in the Treaty to allow associations to bring an action where the enterprises forming that association would have been unable to bring one, it followed that it was only an association composed of those enterprises which could themselves bring actions that could appeal to the court. That is to say, the only associations that can appeal are those formed by enterprises which produce coal or steel as defined in Article 80 of the Treaty. A list was therefore set out of the enterprises forming the *Association des Utilisateurs de charbon de Luxembourg*.[49] The court then turned to consider the memorandum and articles of the plaintiff association. These set out that it was the aim of the Association (a) to defend and represent the interests of the consumers of coal within the limits of the objectives of the European Coal and Steel Community and (b) to give advice concerning questions which are of interest to the consumers of coal and which might be submitted to it.

[48] See above, p. 605.

[49] The list is as follows: *The Fédération des Industries Luxembourgeoises; The Groupement des Industries Sidérurgiques Luxembourgeoises; The Groupement des Négotiants de combustibles en gros*; and M. Léon Brasseur, Engineer, representing the *Usines à gaz du Grand-Duché de Luxembourg*.

On this the court declared: "Article 1 of the memorandum and articles of the association does not allow any doubt that its object is to defend and represent the interests of its members in their quality as consumers [*i.e.*, not producers] of coal and to give advice concerning questions of interest to the consumers of coal."

On this ground the court declared the plaintiffs not to be an association capable of appealing under Article 35 of the Treaty.

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EQUITABLE RELIEF IN THE LAW OF HIRE-PURCHASE

THE article by Mr. Aubrey L. Diamond in the *Modern Law Review* of September, 1956 (at p. 498), advanced the view that the court has power to grant equitable relief to the hirer of goods under a hire-purchase agreement, when in its inherent discretion it desires so to do. The basis of the learned author's contention appears to be as follows:—

(a) That the decision in *Cramer* v. *Giles*[1] which is "usually cited for the proposition that equity will not relieve the hirer against a forfeiture caused by default in punctual payment of instalments," does not expressly deal with the question of equitable relief, and is not therefore good authority for the proposition mentioned.

(b) That the courts have recently construed certain "minimum payment" clauses as being of a penal nature, and therefore unenforceable.[2]

(c) That for the purposes of relief against forfeiture the courts are likely to treat hire-purchase agreements in the same way as a contract for the sale of goods (see *Warman* v. *Southern Counties Car Finance Corporation, Ltd.*),[3] and that, therefore, relief against forfeiture can be given in the same way as it has been held to be permissible in certain cases of goods being purchased by instalments; namely, by preventing the owner from forfeiting the instalments already paid when goods are retaken as a result of the hirer's breach of a term of the agreement.[4]

It was further contended that relief might be given to an assignee of the hirer, because of his status *qua* assignee, and because of the court's inherent jurisdiction to grant relief to a defendant.

The purpose of the present article is to suggest that there is in fact no power at common law (including equity) to grant relief against the enforcement of the terms of a hire-purchase agreement (except within the normal rules of the law of contract), and also that, in one case at least, the Hire-Purchase Acts of 1938 and 1954 have not provided any form of statutory relief.

It is suggested that a typical set of circumstances in which a claim for relief might (morally) be most properly considered, is in a case similar to the following—

H acquires goods under a hire-purchase agreement for a total sum of £500. Having paid £400 H defaults in his weekly

[1] (1883) Cab. & Ell. 151.
[2] See, for example, *Cooden Engineering Co., Ltd.* v. *Stanford* [1953] 1 Q.B. 86; *Lamdon Trust, Ltd.* v. *Hurrell* [1955] 1 W.L.R. 391.
[3] [1949] 2 K.B. 576.
[4] See *Stockloser* v. *Johnson* [1954] 1 Q.B. 476.

> payment of £5, and, consequently, three months later (when there is £60 owing by way of arrears) O, the owner, terminates the agreement and recovers possession of the goods which are then agreed to be worth £400. O then sues H for the £60 arrears of hire-purchase payments.

Thus, the owners of the goods have not only received £400 in cash from the hirer, but have also recovered the goods valued at another £400, when the total sum to which they would have become entitled under the agreement was only £500.

It is submitted that in such a case no relief could be granted to the hirer of the goods, either by remitting the £60 arrears, or by permitting him to recover any part of the £400 which he had paid by way of "rent." This, it is contended, is clearly established by two decisions, neither of which was referred to by the learned author of the above-mentioned article.

In *Brooks* v. *Beirnstein*[5] the facts were as follows: a hire-purchase agreement in respect of a quantity of furniture provided that the owner might recover possession of the goods if the terms of the agreement were not complied with, and so on the hirer being in arrears with his payments the owner retook possession of the furniture. He then sued for the arrears, and the Divisional Court held that he was entitled to them. The position was concisely stated by Bigham J., at p. 102, when he said—

> "The (agreement) states that the hirer agrees to hire the goods described in the schedule at a rent of £7 per month and to pay the monthly rent punctually. Then there is a provision that if the hirer does not perform the agreement the owners may retake possession of the furniture by force. The agreement in so conferring the right to retake possession on a breach by the hirer does not take away any other rights which the law gives to the owners among which rights is that of suing for the monthly rent which had already accrued."

Some thirty years later a similar case came before the Court of Appeal and the principle in *Brooks*' case was upheld. In *South Bedfordshire Electrical Finance, Ltd.* v. *Bryant*[6] there was a hire-purchase agreement in respect of a cold-room. On the hirer falling into arrears with his payments the owners obtained judgment for the amount due to them, but when this judgment was not satisfied they sued for possession. The Court of Appeal held that they were entitled to possession since the first action, being merely for instalments due, did not transfer the property in the cold-room to the

[5] [1909] 1 K.B. 98. Similarly, the following argument is reported to have taken place in *Brooks*' case: Bigham J. (to Counsel): "The result of your contention is that if the hirer is in default and the owner waits until the last instalment is due he may retake the goods and recover the whole of the price as well." Counsel: "Yes. If hirers choose to enter into improvident contracts of that kind they cannot be heard to complain." And in the *South Bedfordshire* case (*infra*) Slesser L.J. stated, at p. 584, that *Brooks* v. *Beirnstein* appeared to him "to be rightly decided."

[6] [1938] 3 All E.R. 580.

hirer: there was still a breach of contract which entitled them to recover possession in spite of the enforceable judgment for the arrears. It is submitted that the opening lines of the judgment of Greer L.J. in the *South Bedfordshire* case are particularly relevant to the present contention. At p. 581 he said—

> "This is an unfortunate case, and if we were entitled to exercise our judgment by reason of our sympathies with the unfortunate defendant, who may have to pay, or have judgment given against him for the full amount of all the instalments, and at the same time is called upon to return the goods . . . we might think there was a great deal to be said for the unfortunate defendant. Having become liable to pay under a judgment every one of the instalments provided for in the contract, he is now asked to deliver up the goods to which, if he had effectually paid all the moneys provided for by the agreement, he would have become entitled as owner. Unfortunately, however, we have merely to consider the agreement between the parties having regard to the facts that were before the judge."

This passage, it is submitted, can only be consistent with there being no power in the court to grant equitable relief in such a case. The words of Greer L.J. "*if we were entitled* to exercise our judgment by reason of our sympathies with the unfortunate defendant" clearly indicate that in the learned Lord Justice's view no such jurisdiction existed, and it is respectfully submitted that this refutes any contention to the effect that the absence of a reference in certain cases (*e.g.*, *Cramer* v. *Giles*) to the right to equitable relief is indicative merely of the fact that such relief was not considered, and not that it was non-existent. It is suggested that the latter is in fact the correct view.

This argument is further strengthened by the recent case of *United Dominions Trust (Commercial), Ltd.* v. *Parkway Motors*,[7] in which the Queen's Bench Division felt constrained to arrive at a result which could not by any standards be regarded as equitable. In that case the plaintiffs entered into a hire-purchase agreement with X for the sale of a motor van, the agreement expressly prohibiting sale or assignment during the subsistence of the agreement. In breach of this term X sold the van to Y, who in turn sold it to the defendants. The plaintiffs sued for damages for conversion of the van, and the defendants tendered the outstanding balance of the hire-purchase price to the plaintiffs, but this was declined. McNair J. held that the plaintiffs were entitled to the normal measure of damages for conversion (namely, the value of the goods), and not merely to the unpaid balance of the hire-purchase price (which was laid down in *Whitely* v. *Hilt* [8] as being the correct measure of damages for the conversion of hire-purchase goods where an agreement had been validly assigned) since assignment had been expressly prohibited.

[7] [1955] 1 W.L.R. 719.

[8] [1918] 2 K.B. 808.

This decision which, it is respectfully suggested, was quite in accordance with the law, did not produce the fairest of results. The "innocent" purchasers had to pay £350 damages (having already paid £410 for the van) to the plaintiffs, who had so far received £529 13s. by way of hire-purchase instalments from X the original hirer. This meant that altogether the plaintiffs received £879 13s. when the original hire-purchase price had been agreed at £626 3s., being a windfall for them of more than £250. And the innocent purchaser had to pay £760 for a van admitted to be worth only £350.

It is submitted that if any right to equitable relief in such a transaction did exist it would have been invoked, if not by counsel, then by the court. To argue that the absence of any mention of equitable relief in the report merely indicates that it was not mentioned, and is not evidence that there is no such principle, is surely the least logical view to take.

Thus, it is submitted that the above cited authorities, together with the more recent decision on another aspect of hire-purchase law, clearly establish that the recovery of possession of goods does not in any way interfere with the right to sue for arrears of hire-purchase payments, and *mutatis mutandis* the recovery of arrears does not deprive an owner of the right to recover possession on continued default; and that, therefore, no right to equitable relief exists at common law (including equity).

Similarly, it is submitted that the case of *Cooden Engineering Co., Ltd.* v. *Stanford*,[9] and the cases[10] following that decision in no way offend against the principle contended for above. That series of decisions merely applies to hire-purchase agreements the basic rule as to the unenforceability of penalty clauses in a contract, which has been an established principle of English law at least since the decision of the House of Lords in 1915 in *Dunlop Pneumatic Tyre Co., Ltd.* v. *New Garage and Motor Co., Ltd.*[11] To suggest that this indicates the existence of a general right to relief in hire-purchase agreements is surely an extension of the case law quite uncontemplated when the decisions above referred to were made.

Finally, it is respectfully submitted that there are no grounds for generally assimilating hire-purchase agreements and contracts for the sale of goods (so far as the right to relief is concerned) since an adjustment similar to that made in *Stockloser* v. *Johnson*[12] could otherwise have been properly brought into the *United Dominions Trust* case. Furthermore, there is nothing in the decision in *Stockloser's* case to indicate that the learned Lords Justices were considering anything more than the ordinary contract

[9] [1953] 1 Q.B. 86.
[10] See n. 2, *supra*.
[11] [1915] A.C. 79.
[12] [1954] 1 Q.B. 476.

of sale: and in spite of *Warman's* case there is no authority for the proposition that contracts of sale and hire are to be generally assimilated.

The Position Under the Hire-Purchase Legislation

The facts considered above deal only with the position under an agreement which is outside the Hire-Purchase Acts of 1938 and 1954. It is, however, submitted that in a case similar to that posed above, but within the financial limits of the Acts, the position would also arise whereby the court would have no alternative but to enforce the terms of the agreement, however inequitable that might appear in the event.

Let us consider the following position—

> H acquires goods under a hire-purchase agreement for the total sum of £200. Having paid £150 H defaults in his weekly payments of £2 and consequently three months later (when there is £24 owing by way of arrears) O, the owner, terminates the agreement and obtains a possession order from the county court, suspended (under s. 12 (4) (*b*) of the 1938 Act) upon payment off of the unpaid balance of the hire-purchase price (this amounting to £50, made up of £24 arrears and £26 still owing in the future) at a specified rate. O had also claimed the arrears but such claim was adjourned when the possession order was granted (since it "took in" the sum claimed as arrears). On the defendant failing to comply with the terms of postponement a warrant of delivery was taken out and the goods recovered in near perfect condition—their agreed value being £140. O then decided to pursue his claim against H for the arrears of hire-purchase payments.

Thus, in this case (similarly to that quoted above) the owners of the goods have not only received £150 in cash from the hirer but have also recovered the goods valued at £140, when the total sum to which they would have become entitled under the agreement was only £200.

It is submitted that in such a case the court would have no power to prevent O from subsequently claiming the full arrears of rent amounting to £24 even though the matter was governed by the Act.

Section 13 of the 1938 Act deals with the position which arises once a possession order has been made under section 12, and gives [13] the court power to modify further the terms of the order whilst its operation is postponed. The section also lays down [14] that while the order is postponed the hirer shall be deemed to be a bailee of the goods on the terms of the original agreement with two qualifications—

[13] Hire-Purchase Act, 1938, s. 13 (4) (*a*) (*b*) (*c*).
[14] *Ibid.*, s. 13 (1).

(a) provided that no further sum shall become due in respect of the unpaid balance of the hire-purchase price, save in accordance with the terms of the order (if necessary, as modified) and

(b) provided that the court may further modify the terms of the hire-purchase agreement as it considers necessary having regard to the variation of the terms of payment.

The first of these provisos clearly refers to sums accruing in addition to any arrears due at the date of the possession order, but the second might be thought to empower the court to give relief in circumstances such as we are here discussing, by reducing or remitting the sum claimed in respect of arrears; since the owner has already recovered more (in money's worth) than he bargained for.

It is submitted, however, that the Act does not give the court any such power, for the following reasons—

(a) The opening words of section 13 (1) are as follows:

"*While the operation of an order* for the specific delivery of goods to the owner *is postponed* under the last foregoing section . . ."

This, it is suggested, clearly means that the provisions of the section only apply so long as the possession order *is postponed*, and since the terms of postponement have been broken, and the goods in fact recovered, the order is no longer postponed but has, in fact, been discharged. Therefore, the section cannot apply in such a case.

(b) Quite apart from the natural meaning of the words of the section, the 1954 Act lends further support to the above contention. Section 2 of that Act deals with section 13 (4) (*a*) (*c*)[15] of the 1938 Act, and lays down *when* that subsection is to apply. The opening words of section 13 (4) are as follows:

"The court may at any time *during the postponement* of the operation of such an order as aforesaid. . . ."

The 1954 Act (s. 2 (1)) then says that this subsection of section 13 is to apply

"at any time before the goods are delivered to the owner in accordance with a warrant issued in pursuance of the order. . . ."

Thus, section 13 (4) could not apply in a case such as the present (as the goods have been recovered under a warrant) and since section 13 (1) is prefixed by words similar to those in section 13 (4), it is submitted that the same meaning should be attached to section 13 (1) as has been expressly enacted with regard to section 13 (4).

(c) Third, it is submitted that to interpret the Hire-Purchase Act, 1938, in this way is quite consistent with the general principles

[15] See n. 13, *supra*.

underlying that legislation (namely, the protection of the hirer from the frequently avaricious and wealthy owner), since, if the hirer had not merely defaulted under the terms of the court order, but had gone to the court on finding himself unable to comply with those terms, then the powers granted by section 13 would still have been subsisting and the hirer's interests safeguarded.

For these reasons it is submitted that on facts similar to those posed above the court would have no power under the Hire-Purchase Acts to prevent an owner from recovering arrears of payments, in spite of his having retaken possession of the goods, the value of which, when added to the amount already received by the owner, might far exceed the total sum to which the owner would otherwise be entitled under the agreement.

In such a case, therefore, no relief would be available at common law (as discussed earlier) or by statute.

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STATUTES

The Rent Act, 1957

Now that the controversial Rent Bill has passed into law it is thought that readers of this *Review* may care for a brief summary of the main provisions of the new Act. The present reviewer previously contributed a critical assessment of the Bill shortly after it had been introduced into the Commons.[1] As anticipated the Bill has undergone little change in its final form and most, if not all, of the criticisms raised in the earlier review still seem to be relevant. In view, however, of the various waiting periods provided in the Act it is still too early to assess the ultimate results of its provisions, though it is already apparent that (as suggested in the earlier review) the main hardships are likely to arise in the category of houses totally freed from control, rather than in the category where control is retained but at increased rents. In particular, one of the unproved assumptions underlying the Act, *viz.*, that those who are unable to pay the new market level of uncontrolled rents will be able to find alternative accommodation released as a result of the operation of the Act itself, will only be finally put to the test when the fifteen months' waiting period has expired. None the less, it is not too early even now to take note of the great burden of anxiety that has been placed upon hundreds of thousands of tenants, which even if in many cases it may ultimately prove excessive or unjustified, is nevertheless likely to continue during many months of uncertainty while the actual effect of the Act gradually clarifies itself with the passage of time. In this connection the newly introduced provision for a three years' agreement may serve to enable a tenant to achieve security of tenure and with it peace of mind for a period, but there is already some evidence at least that this machinery can be, and is in some cases being, used by landlords to exact an excessive rent for the three-year period.

The purpose of this note, however, is not to repeat earlier criticisms or raise fresh ones regarding the Act. Time only will show whether the many attacks to which the Bill was subjected were well-founded or not. Nor is it felt that any useful purpose can be served in this place by an attempt to answer the many doubtful points or to elucidate the many obscurities which characterise this complex measure, whose involved style is only too familiar to all those who have had to wrestle with our earlier rent control statutes. The rest of this note, therefore, will be confined to a short survey of the main provisions of the Act, with some reference to any significant changes made in the form of the original Bill as introduced into the Commons last year.

[1] See (1957) 20 M.L.R. p. 157.

The pattern of the Act can be regarded as falling into five separate parts, though it is not in fact so divided.

(1) The increase of rents of houses which are still controlled (ss. 1–6) (ss. 7–8 deal with Scotland, but this note will be confined to the law of England and Wales).

(2) Release from control of certain dwellings (ss. 9–12).

(3) Premiums (ss. 13–15).

(4) Miscellaneous provisions (ss. 16–18).

(5) Provisions as to the detailed machinery of certain aspects of the Act such as adjustments of rent in respect of repairs, and transitional and consequential provisions (Scheds. 1–8).

A few words will be said about each of the above parts of the Act in the order in which they appear.

(1) The provisions regarding increases of rents of controlled dwellings are by now so familiar that only a very brief outline is warranted here. A new upper rental limit for controlled dwellings is fixed at twice the gross 1956 rateable value, subject to adjustment according to how the responsibility for repairs is apportioned by the terms of the tenancy as between the parties. The Act expressly confines the operation of this new limit to cases where the existing recoverable rent does not already exceed the new statutory limit; where the existing rent is already in excess of the new limit the former will still remain the recoverable rent. This has the unfortunate effect of preserving the whole of the old and otherwise repealed law regarding rent control in relation to what is probably a comparatively small number of cases, and it does seem most regrettable that Parliament has not seen fit to sweep away the old law once for all by fixing the new limit for every controlled dwelling.

Adjustments are also allowed in the recoverable rent in regard to charges for furniture and services and changes in the amounts payable for rates; and provision is also made for increases for improvements.

A provision now inserted in the Act (s. 6) also makes it clear that no increases can be claimed during a contractual tenancy, save as permitted by the terms of that tenancy.

Increases authorised by the Act require a three months' notice in prescribed form, and the total increases which can be claimed in the nine months after service of the first notice are limited to seven shillings and sixpence a week.

(2) As to decontrol, the Act introduces two new ways in which decontrol can arise.

(i) Any dwelling whose rateable value on November 7, 1956, exceeded in London £40, and elsewhere £30, is automatically decontrolled. The Minister is also given power to provide by order that these financial upper limits can be lowered from time to time so as to extend automatic decontrol to further categories of

dwellings. Similar decontrol provisions are contained in the Act in relation to furnished dwellings.

(ii) The Rent Acts are not to apply to any new letting which comes into effect after the commencement of the 1957 Act. The only exception is where the new tenancy is granted to a person who, immediately prior to the grant, was already a controlled tenant of at least part of the premises comprised in the new grant.

(3) Dwellings which are released from control under the aforesaid provisions of the Act are still to be subject to control, so far as the premium provisions of the Rent Control Act, 1949, are concerned, for a period of three years from the commencement of the Act. There are also provisions restricting in such cases the freedom of the landlord to require payment of rent in advance.

The premium provisions of the 1949 Act are also now extended in all cases to cover the making of any loan (whether secured or unsecured) as they apply to requiring payments in addition to rent.

All these matters are additions to the original form of the Bill.

(4) The miscellaneous matters deserving of note here are as follows:

(i) There is a perfectly general provision in regard to dwellings requiring any notice to quit to be given not less than four weeks before the date on which it is to take effect. This useful change in the law was introduced by way of amendment to the original Bill (s. 16).

(ii) Another new amendment in the Act (s. 17) is a provision to facilitate the exchange of a statutory tenancy. As, however, an agreement to be effective under this section requires the consent of the landlord, this provision does not seem to be of great practical significance.

(iii) As regards what are called "long tenancies" under Part I of the 1954 Act (*i.e.*, tenancies of more than twenty-one years), it will be recollected that the 1954 Act provided for a special form of control on the expiry of any such tenancy let at a "low rent" (*i.e.*, less than two-thirds of the rateable value). The 1957 Act does not disturb Part I of the 1954 Act, but further provides that the Rent Acts are not now to apply to any long tenancy, but that Part I of the 1954 Act is to apply to all long tenancies, whether at a low rent or not (s. 21 and *cf.* s. 11 (4)).

(5) As regards the elaborate and involved machinery set out in the Schedules to the Act, little need be said here.

(i) The First Schedule contains some very complicated provisions for the abatement of rent increases where the premises are in disrepair. These provisions impose what seem to be very difficult procedural burdens on the tenant, *e.g.*, as to notices to be served, and it remains to be seen how far they will form an effective remedy in relation to a landlord who insists on his full rent while neglecting his duty to keep the premises in a fit and proper state.

(ii) The Fourth Schedule contains a mass of detailed transitional

provisions relating to decontrol. It will suffice here to refer generally to the provision which extends protection to a decontrolled tenant for fifteen months after the coming into operation of the 1957 Act. This "standstill" arrangement is now subject to the newly introduced qualification, already referred to above, which enables the parties, by agreeing to a new tenancy for three years, to agree also to the payment of an increased rent even during the aforesaid fifteen months' period.

(iii) Lastly, reference may be made to clause 21 of the Sixth Schedule, amending para. (*h*) of the First Schedule of the 1933 Act, (which enables a landlord to claim possession where he requires the dwelling for his own occupation as a residence). Clause 21 now introduces a new date after which the landlord must not have "purchased" the dwelling. This new date is November 7, 1956.

Dennis Lloyd.

The Magistrates' Courts Act, 1957

Trial in one's absence

The problem presented by the absent defendant in the trial of minor offences had become one of great urgency in recent years. As the Report of the Departmental Committee set up to consider the matter showed,[1] this was primarily because of the vast increase in the proportion of road traffic cases, in many of which it had become the practice for the defendant to send a letter to the court in lieu of attending in person, and for the court to proceed in the defendant's absence. This practice did not lack legal basis,[2] but the difficulty was that it was still necessary for the prosecution's witnesses to attend the court for the purpose of giving evidence. Moreover, there was a further problem concerning the proof of previous convictions where the defendant did not appear.

The Departmental Committee, which was appointed in October, 1954, and reported in July, 1955, was charged with considering "what changes, if any, should be made in the law relating to the trial of minor offences in magistrates' courts with a view to saving the time of the courts and of witnesses without prejudicing the rights of the defendant, and in particular to recommend whether changes should be made:—

(a) to permit a defendant to enter a plea of guilty without appearing before the court;
(b) to permit of the easier proof of previous convictions where the defendant does not appear;
(c) to permit a monetary penalty, not in excess of an amount fixed by law, to be accepted in settlement of an admitted

[1] Cmd. 9524, July, 1955, §§ 6 and 7, pp. 6–7.
[2] Magistrates' Courts Act, 1952, s. 15.

offence, without a hearing before a court, if both the prosecutor and the accused so wish."

Those familiar with the practice in some Continental countries of fining traffic offenders "on the spot," or the American practice (also found elsewhere) of fixing traffic tickets to the offender's car in the case of parking offences, may have hoped (or feared) that the Committee would espouse some such revolutionary remedy for the situation in this country, but witnesses before the Committee expressed no enthusiasm for such innovations,[3] and the Committee's recommendations adopt a far more British compromise, the result of a gradual evolution rather than any sudden departure. The Magistrates' Courts Act, 1957, gives effect to these recommendations.

The Act applies[4] to persons summoned to appear before a magistrates' court, other than a juvenile court,[5] to answer to an information for a summary offence, not being either an offence also triable on indictment or an offence for which the accused is liable to be sentenced to imprisonment for a term exceeding three months, and the system is now in force.[6] The prosecutor serves a notice concerning that procedure on the defendant together with a concise statement of the facts relating to the charge which it is intended to place before the court if the accused pleads guilty without appearing before the court.[7] The clerk of the court is notified that this procedure has been adopted. Then, if the defendant or his solicitor notifies the clerk that he desires to plead guilty without appearing before the court, the clerk informs the prosecutor, and when the case comes up for hearing, the court may proceed to dispose of the charge in the absence of the defendant, whether or not the prosecutor is absent, provided that it is proved to the satisfaction of the court that the necessary notice and statement of facts have been served upon the accused with the summons.[8] The court is not bound to proceed in this way but may, if it prefers, adjourn the trial for the purpose of dealing with the matter as if the notice had not been given.[9]

Section 1 (2) contains three safeguards which the Committee thought should be incorporated in the new procedure. First, if the defendant wishes he can withdraw his notification to the clerk by intimation in writing at any time before the hearing, then the clerk informs the prosecutor and the case proceeds under the

[3] See § 64 of the Report, p. 26.
[4] s. 1 (1) defines the scope of the new procedure.
[5] The Committee considered whether the procedure should be extended to the juvenile courts, and recommended that it should apply to the trial of young persons, but made no recommendation one way or the other with regard to the trial of children: §§ 48–50, pp. 21–22.
[6] ss. 1, 2 and 3 came into force three months after the Act was passed, *i.e.*, on September 6, 1957. See s. 6 (4) of the Act.
[7] s. 1 (1).
[8] s. 1 (2).
[9] s. 1 (2) (*b*).

ordinary rules of procedure. Secondly, before accepting the plea of guilty and convicting the accused in his absence, the court shall cause the notification and statement of facts to be read out before the court, together with any submission which the accused wishes to be brought to the attention of the court with a view to mitigation of sentence. Thirdly, unless there is an adjournment, the prosecutor must confine himself to the facts stated in the statement of facts which was served on the accused, and the court shall not without adjourning sentence him to any term of imprisonment or to any other form of detention, or order him to be disqualified.

The solution adopted to the other problem, that of facilitating the proof of previous convictions in the absence of the accused, is to provide that where seven days previously a notice has been served on the accused specifying any alleged previous conviction of a summary offence, and the accused is not present in person before the court, the court may take account of any such previous conviction as if he had appeared and admitted it.[10] This seems to be quite a satisfactory procedure. A similar arrangement has worked in Scotland and Northern Ireland [11]; we shall now see how it works here.[12]

J. E. Hall Williams.

[10] s. 3.

[11] The Act does not extend to Scotland and Northern Ireland, which already have similar procedures for dealing with the absent defendant.

[12] The Act also deals with the problem of proof of identity of the driver of a vehicle, s. 2, and with certain other matters.

NOTES OF CASES

Grievous Bodily Harm and Implied Malice in Murder

The case of John Wilson Vickers created a furore for several reasons. Not only was it one of the first cases of capital murder to be decided under the Homicide Act, 1957, but it was also one of those rare cases where the Lord Chief Justice convened a full Court of Criminal Appeal because, to quote his own words, a point of law had arisen which was "of great importance," and when the court originally considered the matter, with three judges, they were not agreed. The full court of five judges (including the original three) were able to reach a unanimous decision, and when the Attorney-General's fiat was sought for an appeal to the House of Lords, this was refused. The Attorney-General's refusal to exercise his discretion in favour of a further appeal was challenged in the House of Commons, no less than sixty-nine members putting their names to Mr. Sidney Silverman's original motion. Doubts were raised whether this motion was wisely worded, and a revised motion was moved and debated on August 1, 1957, and negatived without a division.[1] Vickers was executed, being the first person to be hanged in the United Kingdom for two years.

There was clearly sufficient here to make the case a *cause célèbre*, but the question we have to consider is whether the case contributes anything to our understanding of the law of homicide and the law governing criminal appeals.

The purpose of section 1 of the Homicide Act, 1957, as the marginal note indicates, is to abolish the much criticised doctrine of constructive malice. The form of words chosen to give effect to this purpose leaves untouched the common law definition of the *mens rea* for murder, *viz.*, "with malice aforethought, express or implied." Implied malice is specifically preserved by section 1 (1) as one of the forms of *mens rea* sufficient for murder. In the past this has been taken to include cases where there was no intention to kill (express malice), but there was an intention to inflict grievous bodily harm on the victim, with the result that he or she died. The question raised on the appeal in *Vickers*[2] was whether the trial judge had correctly explained the law to the jury.

Hinchcliffe J. had said that "malice will be implied, if the victim was killed by a voluntary act of the accused . . . done with the intention either to kill or to do some grievous bodily harm." In regard to the intent to do grievous bodily harm, the learned judge pointed out that "the grievous bodily harm need not be

1 H.C.Parl.Deb. (5th Ser.), Vol. 574, cols. 1623 *et seq.*
2 [1957] 3 W.L.R. 326; [1957] 2 All E.R. 741.

permanent, but it must be serious, and it is serious or grievous if it is such as seriously and grievously to interfere with the health or comfort of the victim." [3]

The facts were that the victim, an old lady of seventy-two, had been struck many blows by the accused, and there was evidence that she had been kicked in the face, which the appellant denied. As Lord Goddard observed, there was certainly evidence on which the jury could find an intention to do grievous bodily harm, if properly directed, and it was held that the judge's direction was impeccable, so the appeal was dismissed.

Two arguments have been advanced in favour of the view that there was a misdirection. The first argument, which was the substance of the appeal, was that the Homicide Act, 1957, having abolished constructive malice, it was a misdirection to say that it was sufficient to establish the offence of causing grievous bodily harm, and where death resulted in the course of that offence, it was murder. It was no longer the case that death inflicted in the course of a felony was murder, constructive malice having been abolished. The only satisfactory way of putting the matter now would be to say that the accused must either have intended to kill or have deliberately used violence of such a character that death would be likely to result.[4]

The Court of Criminal Appeal quite firmly rejected this argument, and in our judgment, rightly so. Mr. Paget had raised a similar point in the Commons debates on the Homicide Bill without success, and the Court of Criminal Appeal have now ruled authoritatively [5] that "it is impossible to say that the doing of grievous bodily harm is the other offence referred to" in section 1 (1) of the Act, which relates to that branch of the doctrine of constructive malice which applies "where a person kills another in the course or furtherance of some other offence."

The second argument advanced by counsel for Vickers is not really answered by the judgment, and was later developed in the House of Commons by Mr. Paget in the debate on Mr. Silverman's motion. It is that causing grievous bodily harm includes inflicting many kinds of injury which would not be regarded as necessarily involving the risk of death, "it is a term of art" and includes "comparatively trifling injuries," says Mr. Paget.[6] Therefore it is a misdirection to direct the jury that an intent to cause grievous bodily harm is sufficient to constitute implied malice.

Although there is some doubt about the precise meaning of "grievous bodily harm," it is clear that "trifling injuries" are not sufficient; the injury must be such as to interfere seriously with

[3] [1957] 3 W.L.R. at p. 330.
[4] The argument is set out more fully in the report of the first hearing, held on July 1, and reported in *The Times*, July 2, 1957, p. 11, cols. 4 and 5.
[5] *Loc. cit.*, p. 330.
[6] *Loc. cit.*, col. 1654.

the health or comfort of the victim. It is true that in *R.* v. *Ashman*[7] it was said that the injury need not be permanent *or dangerous*,[8] but in practice it must be something pretty substantial. The Royal Commission on Capital Punishment discussed a proposal to adopt a requirement of " serious bodily injury " as distinct from " grievous bodily harm " to connote the graver type of injury required to have been intended in order to substantiate a charge of murder where death results. But they thought that " it would in practice be difficult to draw a clear distinction between these terms." [9] Yet it is precisely this distinction which it would appear at first sight that the *Vickers* case has now drawn. The judge in directing the jury emphasised that the injury must be serious and " such as seriously and grievously to interfere with the health and comfort of the victim," and this was held to be a proper direction. But does this mean that we are now faced with the dichotomy which the Royal Commission dismissed as unsatisfactory? This seems unlikely. It is submitted that there are not two kinds of grave injury, " grievous bodily harm " sufficient to found the felony, and " serious grievous bodily harm " sufficient to constitute implied malice for murder, although there may well be a tendency to emphasise the requirement of seriousness where a murder charge is involved.[10]

The way out of the difficulty, as Mr. Paget rightly remarked, is to adopt the test of foresight of the death of the victim, so persuasively advanced by Mr. Turner and incorporated by him in his edition of Russell on *Crime*.[11] For the courts to cling to outmoded means of expressing the necessary *mens rea* for murder does not assist the scientific development of the criminal law, and it may well cause misunderstanding, as in the *Vickers* case. What is needed is a clear recognition that murder requires either an intent to kill or recklessness as to the likelihood that death may result from one's conduct. The writer's opinion is that the direction to the jury in this case was a perfectly correct way of explaining the meaning of implied malice in murder, but was not necessarily the best way of expressing the position, and that the case contributes very little to our understanding of the law of homicide.

As to our understanding of the law governing criminal appeals, it likewise contributes little. There was no reason to doubt that the Attorney-General exercised his discretion judicially in this matter, and it may well have been a judicious decision on his part. In view of the eventual unanimity of the Court of Criminal Appeal, it would not seem proper to sanction a further appeal, especially where a person was under a capital sentence and the result of the appeal would be unlikely to be different. However, it does seem a pity

[7] (1858) 1 F. & F. 88.
[8] Italics supplied.
[9] Cmd. 8932, p. 162, § 472.
[10] See further, 15 M.L.R. 345, and Cross and Jones, *An Introduction to Criminal Law*, 3rd ed., 1953, pp. 251–252.
[11] 10th ed., 1950, Vol. 1, pp. 533 *et seq.*

that the Court of Criminal Appeal did not reserve judgment, and it may well be desirable to remove the discretion concerning appeals to the House of Lords in criminal cases from the shoulders of the Attorney-General, as is now proposed in Mr. Montgomery Hyde's Bill.[12] Whether a reprieve might have been recommended was a matter for the Home Secretary, and there will be many who feel that in this case the law should not have been allowed to take its course. That is not a question of law however.

J. E. Hall Williams.

Effect of a Foreign Decree of Judicial Separation

The decision of Sachs J. in *Tursi* v. *Tursi* [1] is as important as it is welcome. Its importance is twofold: on the one hand, it is the first English case in which a foreign decree of judicial separation has been treated as effective in this country and, on the other hand, the judgment contains some important observations on the problem of the interpretation of statutory provisions when they are later re-enacted in a new statute.

The parties were of Italian nationality and domicile. They married in Italy in 1942 and a few months later the husband deserted the wife. In 1947 the wife obtained from the Civil Tribunal in Rome a decree of judicial separation on the ground of the husband's desertion and cruelty. In 1949 the wife came to England and has been resident in this country ever since. In the present action, relying on section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, she petitioned the court for a decree of divorce on the ground of her husband's desertion for a period of three years either immediately preceding the presentation of her petition or, alternatively, preceding the Italian decree within the rule embodied in section 7 (3) of the Matrimonial Causes Act, 1950. The suit was undefended but the court heard argument by counsel for the Queen's Proctor.

The first question to be considered by the court was whether the Italian decree should be allowed to operate in this country so as to prevent the continuance of desertion thereafter. Sachs J., in a carefully considered judgment, answered the question in the affirmative. In the absence of any English authority the learned judge gave his full attention to the Australian case of *Ainslie* v. *Ainslie* [2] and found himself in substantial agreement with it. In reaching his conclusion he first dealt with arguments based on general principles and then with the practical convenience of a decision either way.

It is often said that a decree of judicial separation is not entitled to extraterritorial validity because, as opposed to that of divorce

[12] Criminal Appeal Act, 1907 (Amendment) Bill, introduced and given First Reading in the House of Commons, July 31, 1957. H.C.Parl.Deb. (5th ser), Vol. 574, cols. 1274 *et seq.*

[1] [1957] 2 All E.R. 828; [1957] 3 W.L.R. 573. [2] (1957) 39 C.L.R. 381

or nullity in the case of a voidable marriage, it does not change the status of the spouses. The present writer could never see much merit in this reasoning and warmly welcomes Sachs J.'s decisive rejection of it: "Whilst appreciating, of course, the practical distinction between those decrees that cut the bond of marriage and those that leave it subsisting, this proposition . . . to my mind savours somewhat of a blend of dogma and absence of precedent." [3]

With respect to the problem of practical convenience the learned judge felt that non-recognition might compel a judicially separated wife, anxious to maintain her status in any new country in which she might be resident, to prove over again the facts which entitled her to the original decree of separation. This would be an intolerable burden in terms of expenditure of money, waste of time and difficulties in securing the attendance of witnesses.

Whilst the court thus pronounced in favour of according the foreign decree of judicial separation its extraterritorial effect, there appear to be three qualifications implicit, though none too clearly stated, in the judgment.

In the first place, Sachs J. emphasised that he was dealing with a decree of a foreign court which exercised in matrimonial matters a jurisdiction equivalent to that of the High Court. Furthermore, the decree in question was final and incapable of unilateral alteration or rescission. In other words, the Italian decree was in these respects identical with a decree of judicial separation made by the High Court. This emphasis warrants the assumption that the learned judge might have reached a different decision had he been asked to recognise a foreign measure similar to a separation order as it exists in this country. The one factor which lessens the validity of this assumption is the learned judge's approval of *Ainslie* which involved a petty sessional order capable of variation or rescission by unilateral application to the court. It is submitted, however, that there are good grounds, both in theory and in practice, for drawing a distinction, in so far as extraterritorial validity is concerned, between a decree of judicial separation and a separation order.[4]

[3] [1957] 2 All E.R., at p. 832. What surely matters is that a decree of judicial separation deeply and, subject only to a possible reconciliation, permanently modifies the conjugal rights and duties. See Atkin L.J.'s judgment in *Eustace* v. *Eustace* [1924] P. 45, at p. 54.

[4] Until the judgment of Gorell Barnes J. in *Armytage* v. *Armytage* [1898] P. 233 it was never doubted that a decree of judicial separation was, like that of divorce or nullity, a general form of matrimonial redress and not merely a means of protecting one spouse against the cruelty of the other. This, together with the characteristics of finality and permanence, distinguishes it from a magistrates' order. In *Ainslie* the decision in favour of recognition was made by the slender majority of six to five judges of the superior courts of Australia. Except, perhaps, in the case of inter-provincial relations in a political unit there is little to be said in favour of extraterritorial validity of separation orders. The writer has considered this and other problems raised by judicial separation in private international law in a paper read before The Grotius Society in July, 1956, and which will be published in the forthcoming Vol. 42 of the Society's *Transactions*.

In the second place, the judgment seems to be confined to foreign decrees pronounced by the court of the parties' domicile. In view, however, of the present decline of domicile as a jurisdictional basis in nullity and divorce, there is no justification for thus restricting recognition of decrees of judicial separation and it should not be withheld in the case where the parties were both resident in the foreign country at the time of the decree. Whilst the precise limits of the jurisdiction of the High Court to grant decrees of judicial separation are far from clear, it certainly exists in the case of the residence of both parties in England. Again, on the principle of reciprocity, recognition should be given to a foreign decree given in circumstances similar to those envisaged in section 18 (1) (*a*) of the Matrimonial Causes Act, 1950.

The last qualification is formulated by Sachs J. in these words: "It thus seems right on principle to recognise . . . decrees of judicial separation pronounced by foreign domiciliary courts in cases such as the present—*at any rate so long as the domicile of the parties remains unchanged.*" [5] It is respectfully submitted that this qualification, a novelty in the field of recognition of foreign matrimonial decrees, appears to be largely spurious and likely in practice to lead to unwarranted complications and inconvenience.

Having reached the conclusion that the Italian decree should be given effect in this country, the learned judge held that in accordance with the rule in *Harriman's* case [6] it prevented, as from its date, the continuance of the husband's desertion. This in turn led him to consider the applicability to a foreign decree of section 7 (3) of the Matrimonial Causes Act, 1950, which provides that a decree of judicial separation, if it has been continuously in force since the time of its making, should be deemed immediately to precede the presentation of the petition for divorce. This section re-enacts the provisions of section 6 (3) of the Matrimonial Causes Act, 1937, which were clearly designed to alleviate the possible hardship to petitioners caused by the application of the rule in *Harriman's* case. It was argued by counsel for the Queen's Proctor that since in 1937 the section would have been interpreted narrowly, in effect confined to English decrees, it must be interpreted in the same way now.[7] Sachs J., however, held—albeit with some hesitation—that to ascertain the present law he must construe the provisions of the relevant statute as a new whole and that, in his view, section 7 (3) must be taken to apply to foreign decrees as much as to English ones. Accordingly, he granted the decree of divorce to the wife.[8] There is surprisingly little authority on

[5] [1957] 2 All E.R., at p. 834 (italics supplied).
[6] *Harriman* v. *Harriman* [1909] P. 123.
[7] It has never been actually decided that s. 6 (3) of the Act of 1937 did not apply to foreign decrees.
[8] Since in divorce proceedings under s. 18 of the Matrimonial Causes Act, 1950, the choice of law clause provides for the application of English domestic law, the court paid no attention to the parties' personal law under which divorce was not legally possible.

this point but it is advanced that the solution adopted by the court inevitably followed its recognition of the Italian decree. To recognise the effectiveness of the foreign decree of judicial separation for the purpose of stopping desertion and, at the same time, to decline to apply section 7 (3) to it would not only be inconsistent but would lead to results both manifestly absurd and unjust. There cannot be any presumption that statutory provisions re-enacted in a new statute are to be interpreted according to the previous state of the law and within the old statutory framework, particularly when the statute in question in its other parts, far from consolidating previous law, introduces great changes in it.

J. K. Grodecki.

Matrimonial Property—The Scope of Section 17

The note by Miss O. M. Stone on the Married Women's Property Act, 1882, s. 17, at p. 281, *ante*, states (at p. 284) that *Re Camkin's Questions* [1] "is principally noteworthy for the application of a previous decision of the Court of Appeal [2] without reference to the disapproval of this decision expressed by the Royal Commission on Marriage and Divorce"; and a footnote cites from this report. With respect, this is hardly an accurate appreciation of the position. In *Re Camkin's Questions*, the relevant question was whether, under section 17, the court had jurisdiction to determine whether or not a husband died owing a debt to his wife. Wynn-Parry J. held that there was no such jurisdiction, and he applied *Tunstall* v. *Tunstall*, which was clearly based on the principle that there was no jurisdiction under the section unless some fund or other property existed. Indeed, the wording of the section (". . . the title to or possession of property . . .") plainly supports this conclusion. What the Royal Commission was critical of was not the deduction of this principle from the Act, but—

(a) the wording of the Act, and
(b) the application of the principle to the facts of *Tunstall* v. *Tunstall*, where the husband still had some £470 in his hands.

Neither of these factors could have made any difference in *Re Camkin's Questions*. In fact, some while before the Royal Commission reported I ventured to be critical of *Tunstall* v. *Tunstall* on much the same lines.[3] Oddly enough, there is some similarity between passages in my note and in the Report (*e.g.*, "If this is so, then the jurisdiction under the section appears to depend upon the form in which the proceeds of sale happen to be when proceedings are commenced" (Note), and "If so, then jurisdiction under section 17 will depend upon what has happened to the

[1] [1957] 1 W.L.R. 255.
[2] *Tunstall* v. *Tunstall* [1953] 1 W.L.R. 770.
[3] See (1953) 69 L.Q.R. 308.

proceeds of sale when proceedings are begun" (Report); "If the proceeds of sale are in the hands of a bank or solicitor . . . there is jurisdiction under the section," and "If the proceeds of sale have been expended in the purchase of some identifiable asset, it seems that there is jurisdiction under the section" (Note), and "If they [the proceeds of sale] are in the hands of, say, a bank or a solicitor or if they have been spent on the purchase of some identifiable asset, there would be jurisdiction" (Report)). I was of counsel in *Re Camkin's Questions*, and although I was there concerned to avoid, if possible, the effect of *Tunstall* v. *Tunstall*, I could not see then (and cannot see now) anything in the criticisms of *Tunstall* v. *Tunstall* that had been put forward that would assist in this task. Even if it is in general terms a "noteworthy" matter for a judge to apply a decision of the Court of Appeal without reference to any "disapproval" expressed by a Royal Commission (if "disapproval" it was), it cannot be very remarkable if that "disapproval" relates to irrelevant matters.

R. E. Megarry.

Mr. Megarry appears to consider that the wording of section 17 of the Married Women's Property Act, 1882, plainly excludes the possibility of money judgments being given by the courts, and that the Royal Commission on Marriage and Divorce agreed that this was so. With the greatest respect, it is surely arguable that, in construing the words: "the title to or possession of property," the courts need not have limited themselves to decisions on specific assets or their proceeds of sale only whilst identifiable. As Bramwell B. said in *Queensbury Industrial Society* v. *Pickles*,[1] "any ordinary person would certainly think it strange if he were told that a debt due to him was not part of his property." Under the section, the judge "may make such order with respect to the property in dispute . . . as he thinks fit, or may direct . . . any inquiry touching the matters in question to be made in such manner as he shall think fit." It is also provided that "any bank . . . in whose books any . . . funds . . . of either party are standing" may apply under section 17. Does this now mean "any fund identifiable with a specific asset"?

The Report of the Royal Commission does not go so far as to say that the wording of the section plainly excludes money judgments (nor, incidentally, did Mr. Megarry in (1953) 69 L.Q.R. 308). The Report says only that *Tunstall* v. *Tunstall* so decided, and it recommends that the courts should be empowered to give such judgments. If I am right in thinking that the first part of paragraph 601, which appears on p. 163 of the Report, indicates

[1] (1865) L.R. 1 Exch. 1, 4.

disapproval of such a restrictive interpretation of section 17, then the recommendation in the Report is not irrelevant to a consideration of *Re Camkin's Questions*. In other words, if I accepted Mr. Megarry's assumptions, my comment might have been irrelevant, but I do not accept them.

I would, however, be the first to agree that the short reference to *Re Camkin's Questions*, which was all I permitted myself at the end of a note already too long, did not draw attention to all the points of distinction between that case and *Tunstall* v. *Tunstall*, and, no doubt, readers will appreciate Mr. Megarry's further elucidation. Mr. Megarry is, of course, also right that in general terms it is not, alas, a noteworthy matter that the courts follow their precedents and disregard the recommendations of a Royal Commission. I was not writing in general, but in particular terms; Mr. Megarry has now set out some of the considerations involved.

O. M. Stone.

Uncommon Law Revisited

Miss O. M. Stone, in her note [1] on the Court of Appeal's decision in *Taczanowska* (*orse. Roth*) v. *Taczanowski*,[2] has rightly said that there is something odd in the application of a rule of the English common law, relating to the requirements of form of marriage, to two persons of Polish nationality who went through a ceremony of marriage in Italy performed by a Polish army chaplain. The natural desire to uphold as valid a marriage, entered into with the intention of conferring matrimonial status upon the parties, should not, however, lead our courts to adopt unsound doctrine. The common law marriage, applicable to British subjects, was a residual concept to be invoked where all else failed and not as Hodson L.J. asserts [3] "the law prima facie to be administered in the courts of this country."

The Court of Appeal unhappily appear to have found support for their view in the judgment of Mayo J. in a South Australian case, *Savenis* v. *Savenis & Szmeck* [4] which was cited to them but not to Karminski J. in the court below.[5] It is of some moment that academic writers had criticised the decision of Mayo J.[6]; and,

1 (1957) 20 M.L.R. 505.
2 [1957] 3 W.L.R. 141; followed by Sachs J. in *Kochanski* v. *Kochanska* [1957] 3 W.L.R. 619.
3 At p. 151. Sachs J. in *Kochanski* (at p. 625) interprets this as operating only when the local law has been eliminated. This interpretation is unconvincing.
4 [1950] S.A.S.R. 309.
5 [1956] 3 W.L.R. 935.
6 See a note by P. Donovan in 25 *Australian Law Journal* and notes by Professor J. G. Fleming in 25 *Australian Law Journal* 406 and 4 I.L.Q. 500.

moreover, a follow-up of the Australian case law in the Digest for 1956 would have readily disclosed the decision of Myers J. in the Supreme Court of New South Wales in *Maksymec* v. *Maksymec*,[7] in which the learned judge expressly differed from the decision in *Savenis*. Apparently, by some mischance, this important decision was not brought to the attention of the Court of Appeal.[7a] Had it been, the court might well have arrived at a contrary decision; at least they would have had to choose between these two conflicting decisions.

Myers J., in *Maksymec*, on similar facts to both *Savenis* and *Taczanowska*, said: "I cannot see any justification for adopting the English common law as the criterion of the validity of a marriage in a foreign country between persons who are neither British by nationality or domicile nor subject to the law of any part of the British Commonwealth. It could indeed be most unjust to do so." After citing instances in which such an injustice could arise, the learned judge added: "I do not think that it is part of the *jus gentium* that the status of persons is or can be governed by the laws of a country which is not their own and to which they could not, on any basis, be deemed to have submitted themselves, to which they have no relation by nationality, residence or domicile, and whose laws could not have been within their contemplation at the time of the transaction in question."

The decision of Sachs J. in *Kochanski* v. *Kochanska*,[8] whilst inevitably following the Court of Appeal's decision,[9] does provide an additional disturbing factor. The residual element of the common law marriage necessarily demanded that it was impossible to comply with the local form.[10] But Sachs J. in *Kochanski*[11] stated that: "there is no evidence that in this particular locality marriages, according to German law, were impossible. Indeed, the inference which I draw from the evidence is that the husband and wife could have married in conformity to German law had they so elected." Despite Sachs J.'s acceptance of the fact that the prima facie rule of the validity of a foreign marriage is the *lex loci celebrationis*, the element of the intention of the parties now plays a curious part in the invocation of the common law marriage.

L. J. Blom-Cooper.

[7] (1956) 72 W.N.(N.S.W.) 522.

[7a] While counsel for litigating parties have a duty to cite all relevant decisions they know of (Lord Justice Singleton, *Conduct at the Bar* (1936), p. 25) it may well be that the duty of counsel for the Queen's Proctor, who was called in to assist the court in the *Taczanowska* case, is to follow up any decision up to the date of the hearing—especially a Commonwealth case.

[8] [1957] 3 W.L.R. 619.

[9] Sachs J. expressly stated (at p. 622) that the Court of Appeal had fully considered the authorities and principles of the common law marriage and therefore it was unnecessary for him to look further than that decision.

[10] Dicey, *Conflict of Laws* (6th ed.), 1949, p. 772.

[11] *Ibid.*, at p. 621.

Birtwhistle *v.* Vardill [1] Provincialism Evaporated?

Conflict lawyers will greet the decision of the Court of Appeal in *Re Marshall* [2] with a fairly contented sigh of relief. The appeal was brought by A against the decision of Harman J.[3] that he could not succeed under the will of his adoptive father's cousin, who died domiciled in England in 1945.

There are three points worth mentioning which were not brought out in the first instance. First, it was agreed between all parties that the word "issue" in the will should be taken to mean "children." [4] Secondly, in the absence of expert evidence on the construction of British Columbian legislation, it was further agreed that they should be construed as if they were British Statutes.[5] Thirdly, the British Columbian adoption legislation [6] was set out and considered at greater length and mention was made of an amendment made to it in March, 1956.

The court started out by expressing doubt—quite rightly, it is submitted—whether the extension of *Re Luck* [7] into the realms of adoption was correct, whilst at the same time leaving open the question whether the appellant's right to succeed depended on his status as determined by the domiciliary law of himself and his adopter or on the rule that, under a gift to a child of A under an English will, no one could take unless he could show that he was in fact the child of A in the sense that he was procreated by A.[8]

There then followed the above-mentioned examination, unlike that of Harman J. in that it was not undertaken on a comparative approach, of the British Columbian adoption legislation. It was pointed out that the position in 1945, the date of the testator's death, was governed by the 1920 Act.[9] The amendments made in 1948 and 1953 and the effect thereof were considered, together with the amendment made in 1956, which reads:

"For all purposes an adopted child becomes upon adoption the child of the adopting parent, and the adopting parent becomes the parent of the child, as if the child had been born to that parent in lawful wedlock . . . For all purposes an adopted child ceases, upon adoption, to be the child of his existing parents (whether his natural parents or his adopting parents under a previous adoption), and the

1 (1840) 7 Cl. & F. 895: see the writer's notes "Birtwhistle *v.* Vardill Provincialism Again?" in (1956) 19 M.L.R. 432, and "Birtwhistle *v.* Vardill Provincialism on the Way Out?" in (1957) 20 M.L.R. 405.

2 [1957] 3 W.L.R. 538: a single judgment was delivered by Romer L.J. The case is also reported at [1957] 3 All E.R. 172.

3 [1957] 1 All E.R. 549, noted (1957) 20 M.L.R. 405. It may be noted that G. did not appeal from the decision dismissing her claim to succeed: see [1957] 3 W.L.R. at p. 541.

4 See [1957] 3 W.L.R. at p. 540.

5 *Ibid.*, at pp. 548–549.

6 The effect of this was shortly set out in (1957) 20 M.L.R. at pp. 407–408. The text of the relevant Acts are set out in the judgment of Romer L.J.: see [1957] 3 W.L.R. at pp. 544–545.

7 [1940] Ch. 864.

8 [1957] 3 W.L.R. at pp. 543–544.

9 *Ibid.*, at pp. 544–545.

existing parents of the adopted child cease to be his parents. . . . The relationship to one another of the persons (whether the adopted person, the adopting parents, the natural parents or any other persons) shall be determined in accordance with [the above]."

The court assumed, but without deciding, that a child adopted under his domiciliary law was not barred from taking under an English will as a "child" of his adoptive parent merely because he was not procreated by his adopter. But, said the court, "the making of the assumption necessarily involves attributing to the testator, in using the word 'child,' an intention different from that which he is presumed by our courts to have. It is established beyond controversy that when an English testator speaks of 'the children' of A, he is prima facie taken to be referring, and referring only, to those persons of whom it can be postulated that they are the lawful children of A. . . . Further than, and by analogy to, this we agree with the view which Roxburgh J. expressed in *Re Fletcher*[10] to the effect that adopted children are prima facie excluded by the rule equally with illegitimate children. If, then, a different intention is to be attributed to a testator, so far as adopted children of foreign domicile are concerned, the rule should not be departed from, in our judgment, further than is necessary; and it is neither permissible nor possible to suppose that the testator intended to bring into the category of children all persons who have been adopted under the *lex domicilii*, however limited the effect of their adoption might be. *It seems to us that only those who are placed by adoption in a position, both as regards property rights and status, equivalent, or at all events substantially equivalent, to that of the natural children of the adopter can be treated as being within the scope of the testator's contemplation.* Such a position was conferred by the amending Act of British Columbia which was enacted in 1956. That Act, however, cannot avail the appellant on any view of the matter, for the date of distribution was already past; and it is necessary, therefore, to inquire whether the earlier legislation was sufficient in its effect to enable the appellant to succeed."[11]

For this purpose the court had to decide whether or not it could take into account the amending legislation of 1948 and 1953 which came into effect before the testator's widow died. It upheld Harman J.'s conclusion that he could look no further than the 1920 and 1936 Acts, but criticised his language for reasons more interesting to Chancery lawyers than conflict specialists,[12] concluding that: "so far as adopted children are concerned their status and capacity to take under a gift to 'children' in an English will is (subject, of

[10] [1949] Ch. 473, at p. 479.
[11] [1957] 3 W.L.R. at pp. 545–546. Italics supplied. By what standards one judges the necessary degree of equivalence is not specifically stated: the general tenor of the judgment would suggest the law governing the adoption, but *cf.* (1956) 19 M.L.R. at pp. 434–435.
[12] *Ibid.*, at pp. 546–547.

course, to British legislation) fixed once and for all at the testator's death and that subsequent legislation in the country of their domicile enlarging their rights is to be disregarded. This view would appear to be consonant with principles of long standing in relation to succession." [13]

In so far as the appellant had, in reliance on the first instance decision of Farwell J. in *Re Luck*,[14] contended that the correct date for ascertaining his status was that of the distribution, he was wrong: the decision was reversed on appeal and anyway the question there was "one of legitimation rather than one of adoption." [15]

The learned judge then proceeded to show why Harman J. was right to reject the appellant's claim:

"On the construction, then, of the Act of 1920, as amended in 1936, it is quite clear to us that such rights and privileges as it conferred upon adopted persons fall far short of those which characterise the status of a child. It is true that under section 7 of the [1920] Act the natural parents of an adopted child are divested of all legal rights in respect of him and are freed from all legal obligations and duties towards him; and that after the adoption the parent by adoption and the minor are to assume towards each other the legal relation of parent and child, and to have all the rights and be subject to all the obligations and duties of that relationship. But in matters of inheritance and succession the rights of the adopted child were to be of a very limited character. In such matters it was only 'in regard to the legal descendants but to no other of the kindred of his parents by adoption' that a child was by section 8 (1) [of the 1920 Act], to stand in the same position as if born to that parent in lawful wedlock; and by section 10 [of the same Act] it was only in a will, grant or settlement executed by the adopted parent himself that the word 'child' was to include an adopted child in the absence of a contrary intention, and not in instruments executed by other persons. It appears to us to be quite impossible to suppose that an English testator, in a bequest to 'children,' could have in contemplation adopted children with such limited rights as these." [16]

The court then turned to an *obiter* consideration of the position on the footing that 1955 was the correct date and that the appellant's claim was affected by the 1948 and 1953 amending legislation. Harman J. had said the effect thereof was that an adopted person stood in regard to the kindred of his parent by adoption in the same position as if born of that parent in lawful wedlock and that the appellant could succeed.[17] Of this the Court of Appeal was "not

[13] *Ibid.*, at p. 547. *Lynch* v. *The Provisional Government of Paraguay* (1871) 2 P. & D. 268, *per* Lord Penzance at p. 271; *Re Aganoor's Trusts* (1895) 64 L.J.Ch. 521 and *Starkowski* v. *Att.-Gen.* [1954] A.C. 155 were cited by the court in support of this statement.

[14] *Supra.*

[15] [1957] 3 W.L.R. at p. 548.

[16] *Ibid.*, at p. 549.

[17] See (1957) 20 M.L.R. at pp. 407–409.

altogether sure,"[18] for, while the amendment did advance the position of adopted children considerably beyond their former position, it " still fell a good deal short of the status of a child in the true sense; and it was not until the Act of 1956 was passed that the difference between the two categories was reduced to vanishing point."[19] It was suggested that after the 1956 Act an illegitimate child could have become legitimated if adopted by its parent and that this would not have been possible before; also that if the domicile of origin of an adopted infant were different from that of the adopter, the child's domicile would probably change as from the date of an adoption under the 1956 Act, but that no such change would have occurred under any of the former legislation; and finally that the appellant might have been a " child " of C. S. Jones for the purposes of an English will had he been adopted under the 1956 Act.

The decision is, it is respectfully submitted, welcome in that confusion must have been worse confounded had the *Re Luck*[20] line been allowed to stand. Provided one accepts that the appellant's right to succeed depended primarily upon the construction of an English will and not, attractively as Harman J. may have reasoned, upon his status, the Court of Appeal's reasoning is beyond reproach, though one still wishes that it should have expressly laid down a clear rule comparable to that contained in paragraph 143 of the *Restatement on Conflict of Laws*[21] in order to quiet one's doubts.

P. R. H. Webb.

Transfer of the Benefit of a Restrictive Covenant

The case of *Re Pinewood Estate, Farnborough*,[1] is notable for a bold attempt by counsel to persuade the court to advance the law of restrictive covenants by allowing the court to follow the intention of the parties when by the technicalities of the law as it at present stands this could not be done.

The relevant facts are quite simple. On December 19 and 20, 1899, a vendor sold the whole of a building site without retaining any land for himself and all the purchasers entered into restrictive covenants of a uniform nature. On December 21, 1899, the purchasers got together and, in consideration of each of them releasing all the others from their particular covenants, they entered into new restrictive covenants of their own choosing. Each covenanted on behalf of " himself or herself, his her or their heirs and assigns . . . and with intent to bind the land to which the restrictive stipulations contained in the Schedule to these presents relate into whosesoever hands the same may come."

[18] [1957] 3 W.L.R. at p. 549.
[19] *Ibid.*
[20] *Supra.*
[21] See (1957) 20 M.L.R. at p. 410.
[1] [1957] 3 W.L.R. 256; also reported [1957] 2 All E.R. 517.

The present action was brought by one successor in title to this agreement to enforce these covenants against another successor.

It was, of course, common ground that these covenants could be enforced if the appellants had acquired by assignment the benefit of the personal covenant, or if the benefit had been annexed to the land they had purchased, or if there was a building scheme.

However, on the facts it had to be conceded that there was a break in the links of the assignment of the personal covenant, and further that the wording of the covenant was not adequate to annex it to the covenantee's land. Finally, Wynn-Parry J. held that although on December 19 and 20, 1899, there existed a building scheme, the covenants entered into on December 21 were not amendments to the covenants imposed under that scheme but were new and distinct covenants. Indeed, it is clear that on December 21 the requirements of a building scheme itself no longer existed as there was no common vendor, and in fact no sale of land at all. Therefore the law relating to a building scheme could not be invoked.

Having thus failed by every known path of the law, the appellants sought to cut out a new path for themselves by contending that the deed of December 21 clearly showed an intention that the parties to it should be mutually bound by those covenants and that that of itself was enough to pass the benefit of the covenants from each covenantee to his successor. They were, therefore, in effect seeking to obtain all the benefits of a building scheme without either a building or a scheme.

The case quoted in support of this contention was *Whatman* v. *Gibson*.[2] Here A had divided part of his land into lots for building, and on their sale A, X and Y had entered into mutual restrictive covenants on behalf of themselves, their executors and administrators. These covenants were expressed to be made with all and each of the others and with their heirs, executors, administrators and assigns.

A then sold part of the land he had retained to B who bought "subject to the stipulations and restrictions relative to the said land." The rest of his land A sold to C who bought with constructive notice of the restrictions. C sought to evade these restrictions and B was granted an injunction to restrain him. Sir L. Shadwell, V.-C., declared: "I see no reason why such an agreement should not be binding on the parties coming in with notice." Notice clearly makes C liable, but the court, however, did not consider the real problem of how it was that B, without a personal assignment of the benefit of the covenant, had acquired the right to sue C.[3] The appellants in the present case submitted that the right was acquired

[2] (1838) 9 Simon 196.

[3] In fact it is a pity that it was not argued that, as a covenantee, A had acquired a right to restrain breaches committed by X and Y, etc., but not to restrain breaches on his own land, as he could not sue himself. C was a successor in title to A, and as B could have no greater rights than A had possessed, B could not sue C.

because effect had been given to the intention of the parties that B should automatically acquire this right. Wynn-Parry J., however, rejected this possibility and thought that the case was to be supported upon the basis that, notwithstanding that it was decided so long ago, it really contained the essential elements of a building scheme. He therefore regarded the case as affording no support to the appellants and for want of other authority he declared the covenants in the present action to be unenforceable.

There are thus only three ways for the benefit of a covenant to be passed: man has not found a fourth.

D. G. Valentine.

Scope of Compulsory Arbitration

The talks at present proceeding at the Ministry of Labour about the possible modification or abolition of the Industrial Disputes Tribunal do not render any the less interesting the decision of the Divisional Court in *R.* v. *I.D.T., Ex p. Queen Mary College*.[1] The I.D.T. has played many roles in industrial relations: for example, not only in heading off major clashes with the big unions, but also in securing an impartial consideration of the merits of a claim where the employees though unionised are not in a position to use the strike weapon, like domestic staff of a private school, or where the employees though unionised are expected not to withdraw their labour in support of their claims because of the sense of moral obligation imposed on them by their professional calling. The *Queen Mary College* case involved this last category of organised professional employees.

Scientific technicians employed at Queen Mary College are members of the Association of Scientific Workers. There are four grades of technician: chief technician, senior technician, technician and junior technician. C was a technician in charge of the Geology Department who applied to the governing body for up-grading to senior technician. His application was refused. C asked his regional organiser to intervene, which the latter did, but the college absolutely refused to discuss the terms and conditions of employment of individual workers with the union: "The college considered, rightly or wrongly, that that was a matter which must be dealt with by the individual member himself direct with the college, and that no external body such as the union ought to be allowed to take part."[2] The regional adviser contacted the Ministry of Labour who asked the college to consider the matter again. The governing body did and reaffirmed its previous attitude; whereupon, a meeting was called of the college group of the Association and the group resolved that C's case be referred as a "dispute" to the I.D.T. The college

[1] [1957] 3 W.L.R. 283; also reported at [1957] 2 All E.R. 776.
[2] At p. 288.

in the present action challenged the tribunal's right to adjudicate the question of C's up-grading.

A "dispute" under the Industrial Disputes Order, 1951,[3] "means any dispute between an employer and *workmen in the employment of that employer* connected with the terms of employment . . . of any of those workmen."[4] And, when the tribunal makes an award, "it shall be an implied term of the contract between the employer and *workers* to whom the award applies."[5]

The college argued that this was a dispute between an employer and a single employee, on all fours with the *Town Clerk* case,[6] and that, furthermore, the award Article strongly implies that workmen could not be said to be parties to a dispute unless they are going to be personally affected by the award. Both arguments were rejected.

The 1951 Order, as was laid down in the *Town Clerk* case, was not intended to support individual bargaining between an employer and one employee, but is an extension of the structure of collective labour relations. It refers to quarrels between an employer or employers, on the one hand, and combinations of employees on the other. The causes of such quarrels are not confined to disputes about the terms of employment of each and every employee involved. It is not an infrequent incident of labour relations for employees to take up the cudgels in defence of what they believe to be the rights of a single fellow-employee, whether it be a question of his earnings or grade or reinstatement or any other matter in which they feel a solidarity of interests or a principle of trade unionism involved. Given the re-establishment after the war of the paramount common law principle of voluntary employment, reinstatement disputes were left outside the ambit of the I.D.T.'s jurisdiction. But with respect to terms-of-employment disputes, no limit—certainly, no artificial limit depending on the cause of the employer-labour quarrel —was intended to the scope of compulsory arbitration in collective labour relations.

Thus the Divisional Court reasoned and in the light of their view of labour relations interpreted the Order. Since the up-grading of C and the refusal of the college to negotiate with the union were matters of legitimate concern to C's fellow-employees and unionists in the employment of the college, those fellow-employees as well as C could be and, on the facts, were parties to the dispute within Article 12 (1). The *Town Clerk* case was readily distinguishable. Its circumstances were exceptional, for the town clerk of the South Shields Corporation was the only employee in the corporation's employment found to be interested in his terms and conditions of service; he confronted his employer quite alone; it was the pure

[3] S.I. 1376.
[4] Article 12 (1). Italics added.
[5] Article 10. Italics added.
[6] *R.* v. *National Arbitration Tribunal, ex p. S. Shields Corp.* [1952] 1 K.B. 46.

case of individual negotiation, and "workmen" in Article 12 (1) means "workmen"; the Interpretation Act, 1889, does not apply.

Nor does Article 10 limit the range of industrial disputes that may be brought to compulsory arbitration. The parties to a dispute need not also be the parties to the ultimate award. By way of squaring the function of the Order with its wording, it was held that "workers" in Article 10 does not mean what it says: it includes the singular; the 1889 Act does apply.

The Divisional Court, therefore, continued the liberal and realistic interpretation of the 1951 Order which earlier had been most notably exemplified in *Ex p. Portland U.D.C.*[7] and *Ex p. Courage & Co., Ltd.*[8]

C. Grunfeld.

Title to Goods Sold by Owner after Unauthorised Sale by Owner's Agent

It would be an interesting diversion—perhaps to be reserved for one's old age—to examine the extent to which legal weapons, forged for the benefit of one kind of person, can be successfully used by another. This, at any rate, is one way of looking at *Eastern Distributors, Ltd.* v. *Goldring* (*Murphy Third Party*).[1] A mobile greengrocer named Murphy owned a Bedford van. He wanted to buy a Chrysler from Coker, a motor dealer, but had no money to pay for it. He needed the van for his business and could not sell it to pay a deposit on the Chrysler. If he had borrowed money on the security of the van, a bill of sale would have had to be given and registered. He could, however, have sold the van directly to a hire-purchase company, used the price to pay at least a deposit on the Chrysler (or indeed for any other purpose) and then paid it back to the company by instalments—provided the sale was a genuine sale and not a disguised loan on security. For some reason or other, however, Coker suggested that Murphy, instead of dealing directly with the hire-purchase company, should adopt the following somewhat complicated and roundabout method of raising the money. Coker was found not to be fraudulent and may simply have wanted the deposit for the Chrysler to go straight to him rather than through Murphy's hands. At any rate, Coker was to pretend to the plaintiffs (the hire-purchase company) that he was selling both vehicles to Murphy, and that Murphy had paid a deposit on both. Then Coker would collect the balance of the price of both from the plaintiffs. The total amount would represent the price for which Coker intended to sell the Chrysler to Murphy. In turn Murphy

[7] [1955] 1 W.L.R. 949.
[8] [1956] 1 W.L.R. 1062: brilliantly analysed by Prof. O. Kahn-Freund in *The Listener*, December 27, 1956.
[1] [1957] 2 All E.R. 525; also reported [1957] 3 W.L.R. 237.

would pay the instalments on both cars to the hire-purchase company. The ultimate result would be that Murphy would have paid the price of the Chrysler, that Coker would be satisfied, and that Murphy would have kept his Bedford van and acquired the Chrysler.

The machinery adopted to bring about this result was as follows. On May 5, 1955, Murphy signed in blank the necessary hire-purchase documents, *viz.*, the proposal forms and the memoranda of the hire-purchase agreements for the vehicles. He also signed a delivery note saying that he had taken delivery of the Bedford. Further, the proposal form for the Bedford contained a printed paragraph by which Coker, as dealer, declared the vehicle to be his absolute property. Coker was to fill in the documents and send them to the hire-purchase company.

It was quite clear that the transaction relating to the Bedford was, as Devlin J. described it, "only ancillary to the purchase of the Chrysler." Unfortunately the Chrysler proposal did not go through. If Murphy had been told this at once, that would no doubt have been the end of the matter. Coker, however, carried on with the Bedford proposal, and the plaintiffs accepted it as a genuine hire-purchase transaction. A sales note recorded the sale of the Bedford by Coker to the plaintiffs for £180 less a deposit of £60. The report does not tell us what happened to the £120, but on May 19 the memorandum of hire-purchase was completed. The plaintiffs signed the counterpart and sent it to Murphy. Shortly afterwards Coker told Murphy that the whole transaction was cancelled, but did not tell him that the Bedford transaction had gone through.

Although he had received the counterpart of the hire-purchase agreement Murphy still thought he owned the Bedford. A month or so later he sold his greengrocery business, including the Bedford, to the defendant for £200. The defendant bought the van in good faith, with the aid of his Post Office savings. Murphy, believing himself to be the owner, had paid no instalments. The plaintiffs therefore terminated the hire-purchase agreement and claimed the van or its value from the defendant. The defendant joined Murphy as third party. Murphy joined Coker, but Coker did not appear. The county court judge gave judgment for the plaintiffs against the defendant and for the defendant against Murphy. But Murphy had neither money nor property to satisfy a judgment against him. So the real issue lay between the hire-purchase company and the innocent purchaser.

The only actual authority given to Coker by Murphy was to bring about the hire-purchase of both the vehicles together. When, therefore, the Chrysler proposal fell through, he acted without actual authority in disposing of the Bedford to the plaintiffs. The true position was that Coker had no title in the Bedford to pass to the plaintiffs.

However, if the plaintiffs had claimed the Bedford from Murphy they would have succeeded on several grounds. Coker had represented to the plaintiffs that he owned the Bedford and was bound by that representation. It could be said that Murphy was privy to that representation and was equally bound by it. Or it could be said that Murphy had given Coker an apparent authority to dispose of the Bedford by signing in blank a document which represented that Coker owned that vehicle. The plaintiffs had not been notified and had no reason to know that there was any limitation on Coker's authority. Further—though this point was not taken by the Court of Appeal—the facts here were distinguishable from those cases where a principal signs and delivers to his agent a blank transfer of shares. For there the transfer does not represent that the agent owns or has authority to transfer the shares. Here the signed document did represent that Coker owned the Bedford van.

So then the plaintiffs, by relying on estoppel or apparent authority, could defeat Murphy's claim to the van. The defendant, however, claimed that these weapons could not be directed against him. He had made no representation to the plaintiffs; nor was he privy to any representation which had been made. He had not obtained the van from Murphy as a volunteer: it may be that if Murphy had given him the van he would also have been encumbered with the burden of the representation to which Murphy had been privy. The defendant was a purchaser for value without notice of the previous transactions; and it is unlikely that he would be held to be bound by representations made by the person from whom he purchased the van.

If, then, the plaintiffs' claim had rested on estoppel alone, it would seem that they would not have succeeded against the defendant. There are various ways in which the underlying reason for this has been stated. But the essence of them all is that "an estoppel gives no title to that which is the subject-matter of the estoppel." [2]

Yet in one sense this is an extraordinary result; for in all other cases where there is an exception to the rule *nemo dat quod non habet* the transferee obtains a title to the goods. The Court of Appeal got out of this difficulty by lining up a transfer by virtue of an apparent authority with these exceptions rather than with estoppel. Devlin J. stated the position in these words (at p. 529):

> "In the same way and for the same reason of mercantile convenience, the courts of common law allowed a good title to a buyer who bought in good faith from a man who had apparently been given by the true owner the right to dispose of the goods. Such a buyer did not merely acquire a title by estoppel . . . He acquired in the same way as the transferee

[2] *Per* Brett L.J. in *Simm* v. *Anglo-American Telegraph Co.* (1879) 5 Q.B.D. 158, at p. 206.

of a negotiable instrument or the buyer in market overt a good title against all the world."

The doctrine of apparent authority, in other words, is not based on estoppel but on mercantile convenience.[3] And the Court of Appeal (p. 531) has applied the principle to any form of representation or holding-out of apparent ownership or the right to sell. "The effect of its application is to transfer a real title and not merely a metaphorical title by estoppel" (p. 532).

The defendant further contended that he had obtained a title under section 25 (1) of the Sale of Goods Act, 1893. In effect, it was argued that, if the plaintiffs had become owners of the van, they, by leaving Murphy in possession of it, had enabled him to sell it to the defendant. At first sight that may seem rather an extraordinary defence because a hire-purchase company usually does leave goods in the hands of the hirer. Usually, however, the hire-purchase company buys the goods from the dealer, and it is the dealer, not the hirer, who has sold the goods. Section 25 (1) refers to "a person having sold goods" who "continues or is in possession of the goods." It was argued, therefore, that Murphy came within this provision and therefore that his sale to the defendant was as effective as if the plaintiffs had expressly authorised him to make the sale.

In fact, of course, Murphy had made no sale because Coker had sold to the plaintiffs without his authority. But because Murphy could not dispute the plaintiffs' title he was bound by the sale and therefore must be treated as "having sold" the van to the plaintiffs. It had been held, however, that section 25 did not apply where the owner sold his goods to a hire-purchase company and then hired them back from the company. *Staffs Motor Guarantee, Ltd.* v. *British Wagon Co., Ltd.*[4] It applies only where the seller continues in possession as seller, not where he changes the character of his possession and becomes a bailee.

If, therefore, Murphy had remained in possession under a *valid* hire-purchase agreement, he would have been a bailee and the defendant would have obtained no title under section 25 (1) of the Sale of Goods Act. Would the same result follow if the agreement was unenforceable? To that point we shall return later.

The Hire-Purchase Act, 1938, s. 2 (2) (*a*) provides in effect that the hire-purchase company cannot enforce a hire-purchase agreement unless "a note or memorandum of the agreement is made and signed by the hirer and by or on behalf of all other parties to the agreement." Murphy had signed a blank form, and it was argued that a blank form is not a memorandum of the "agreement." The provision allows signature by an agent for the other parties, but not by an agent for the hirer—not that that mattered, because Coker did not sign for Murphy. The relevant point, however, is

[3] See Powell, *Law of Agency*, pp. 60–62.
[4] [1934] 2 K.B. 305.

that section 2 (2) (*b*) and (*c*) specify the required contents of the note or memorandum. It was undoubtedly the purpose of the Act that the hirer should have these contents before him when he signed and therefore a signature to a blank form would not satisfy the section. It followed that the hire-purchase agreement was unenforceable by the plaintiffs. The opening words of section 2 (2) are as follows:

> "An owner shall not be entitled to enforce a hire-purchase agreement or any contract of guarantee relating thereto or any right to recover the goods *from the hirer* . . ."

The defendant of course was not the hirer or a guarantor of the hirer. Section 2 (2) does not deprive the owner of the right to recover the goods from anyone else. Nor does it deal with a claim in conversion such as that of the plaintiffs in this case. But section 17 of the Hire-Purchase Act does deal with a claim for conversion against the *hirer*. The *hirer* is not to be liable to the owner for conversion if *he* refuses to give up possession of the goods to the owner while the owner's right to recover possession is subject to any restriction by virtue of the Act; and presumably "restriction" includes the result of non-compliance with section 2 (2).

"These provisions," said Devlin J. (at p. 533) "contemplate that the hirer may enjoy the possession of the property without having to pay for it." The court agreed with the submission of counsel for Murphy that a hire-purchase company which fails to see that a proper memorandum is made should be penalised. Whether *per incuriam* or deliberately, the Legislature has left open the possibility of suing the hirer for any kind of conversion other than a refusal to deliver up the goods. Thus he may be liable in conversion if he sells the goods to a third party. He cannot rely on the unenforceability of the agreement, sell the goods, and pocket the price he gets for them. Nor can his purchaser take the benefit of section 2 or section 17 because "it is clear that neither section 2 nor section 17 takes away from the owner any rights which he has against persons other than the hirer."

To return to the effect of section 25 of the Sale of Goods Act, 1893, if the hire-purchase agreement was unenforceable against the hirer (as the court held here), could Murphy be said to be in possession of the van as a bailee and not "as seller"? Section 2 (2) of the Hire-Purchase Act, 1938, merely says that the owner cannot enforce the hire-purchase agreement. It does not make the agreement void. The agreement converted Murphy into a bailee and it was as a bailee that he sold the van to the defendant.

The oddity of this case was that the plaintiffs should be able to take advantage of the kind of protection which normally is available to a defendant in cases where two innocent parties suffer from the mischievous acts of a third. The defendant was unable

to divert the same shields to his own defence; the shields were converted into weapons of attack against him. The court (at p. 534) described the defendant's fate as one which is "unfortunately, a common one where hire-purchase agreements are concerned, and is now one of the regular ways in which unsuspecting buyers are deceived by what they take to be ownership." Perhaps a system of registration of hire-purchase agreements, coupled with voidness for non-registration, would help in reducing the risks to innocent purchasers. It is a matter for careful consideration, however, whether such a system would be practicable and whether it would interfere too much with mercantile convenience.

In any case, it is becoming increasingly obvious that whenever there is an increase in the volume of sales of goods—and the hire-purchase system tends to produce such an increase—the need to protect innocent purchasers from sellers who appear to be owners is intensified. It may be doubted whether this can be done effectively by distortions of the principle of estoppel. Nor do the present one-sided rules work justly in a case, such as the present, where neither plaintiff nor defendant is in any way at fault, and where apportionment of the loss may perhaps produce a more equitable solution.

RAPHAEL POWELL.

VICARIOUS LIABILITY FOR BREACH OF STATUTORY DUTY

DR. Glanville Williams in a penetrating article entitled "Vicarious Liability: Tort of the Master or of the Servant?"[1] recently commented on the fact that this question had strangely lain unnoticed for so many years and then suddenly "leapt to the fore as one of the main theoretical problems of the law of tort." Whilst it is true that in the ordinary run of cases no practical significance attaches to which of these alternative formulations of vicarious liability is adopted, the choice of one or other may affect the actual outcome of litigation in a small number of marginal, but by no means negligible, situations. The stock example is, of course, the case where the servant has a personal defence to an action in tort, as where a husband negligently injures his wife in the course of his employment, and the wife sues the employer in the teeth of the marital immunity which would protect the servant-husband from personal liability. Here, recovery has been allowed on either of two theories: (1) without departing from the wide-held view that the master is liable for the *torts* of his servant, it may be said that the husband's immunity is merely procedural, does not destroy the tortious quality of his conduct and should not be permitted to furnish protection to third parties[2]; (2) alternatively, it has been

1 (1956) 72 L.Q.R. 522.
2 *Waugh* v. *Waugh* (1950) 50 S.R. (N.S.W.) 210, and Singleton and Hodson L.JJ. in *Broom* v. *Morgan* [1953] 1 Q.B. 597.

maintained that "vicarious" liability is really a misnomer; the true principle being that the law attributes to the employer, not the servant's *liability*, but merely his *acts*.[3] This reasoning provides a neat method of holding the employer responsible despite the existence of any personal defence available to the servant himself.

Of more doubtful wisdom is the attempt to use this second theory (the "master's tort" theory) as a device for enabling the employer to *escape* liability for actionable torts committed by his servants in the course of employment.[4] It cannot be too often reiterated that legal concepts and techniques are means, not ends. Unfortunately, however, it is all too often the case that a mode of reasoning, which commends itself for the solution of one particular situation, is mechanically transferred to another, where its application leads to entirely opposite policy results.[5] This regrettable tendency is illustrated by the recent decision in *Darling Island Stevedoring Co.* v. *Long*,[6] where the High Court of Australia had to face the problem, repeatedly skirted by the House of Lords,[7] whether a master is vicariously responsible for injuries caused by breach of a statutory duty personal to his servant. A wharf labourer sued his employer, the defendant stevedoring company, for injuries sustained through the displacement of a hatch beam. In an earlier action, based on common law negligence, his claim was dismissed by reason of his contributory negligence. Undeterred, he then brought the instant proceedings, alleging breach of a statutory duty, in relation to which the defence of contributory negligence has been abrogated by statute in New South Wales.[8] This claim was based on failure to comply with a statutory safety provision which imposed a duty of compliance on "the person in charge" on pain of a fine of £100. Reversing a majority decision of the Full Court of New South Wales,[9] the High Court unanimously held that no liability attached to an employer with respect to breach of a statutory duty imposed not on him, but on the foreman in charge of the unloading operation, even though the latter's dereliction occurred in the course of his employment. Kitto and Taylor JJ., and only a little less forcibly, Webb J., rejected the submission that a master was vicariously liable for the *torts* of his servants; in their view, the law merely attributes to the master the *acts* of his servant and, in order to reach the former, it was essential to prove the existence of an independent duty resting on

[3] Denning L.J. in *Broom* v. *Morgan*, *supra*. Also Lord Goddard, as reported in [1952] 2 All E.R. 1007.

[4] *Cf. Twine* v. *Bean's Express* [1946] 1 All E.R. 202; *Conway* v. *George Wimpey & Co.* [1951] 2 K.B. 266.

[5] *e.g.*, the extension of the rule in *Ormrod* v. *Crosville Motor Services* [1953] 2 All E.R. 753 into the field of "imputed" contributory negligence, as in *Pennell* v. *O'Callaghan* [1954] V.L.R. 320; *Manawatu County* v. *Rowe* [1956] N.Z.L.R. 78. See Fleming, *Law of Torts*, 285–286.

[6] [1957] A.L.R. 505; 31 A.L.J. 208.

[7] See n. 10, *infra*.

[8] Statutory Duties (Contributory Negligence) Act, 1945.

[9] [1956] S.R. (N.S.W.) 387.

him. Since the statutory duty in question was placed on the shoulders of the foreman alone, the case against the employer therefore collapsed. Fullagar J. emphatically disassociated himself from this approach, stating that the employer's responsibility was a rule formulated in terms of liability, not of duty. He concurred, however, in the decision on the ground, also espoused by Williams J., that it would enlarge the scope of the statutory duty to extend its incidence beyond the person specifically identified by the legislature.

Is this conclusion commendable? On the technical level, it undoubtedly runs counter to the view expressed by Lord MacDermott and, perhaps by Lord Porter in *Harrison* v. *National Coal Board* [10]; quite apart from the many occasions in which the point seems to have gone by default, as in *L.P.T.B.* v. *Upson*.[11] More important is the question whether the decision is socially desirable. As Fullagar J. in the instant case so well put it, the principle of vicarious liability "was adopted not by way of an exercise in analytical jurisprudence but as a matter of policy which did not really need to be juristically rationalised." Without elaborating the matter in detail, it can be confidently asserted that there are at least three policy factors supporting the liability ordinarily imposed on the employer. The master is better able to compensate accident victims than the less pecunious employee, the rule advances the policy of wide loss distribution among that section of the public which benefits from the enterprise, and it plays a significant part in accident prevention in so far as deterrent pressure is most effectively brought to bear on the employer, who is in a strategic position to reduce accidents by efficient organisation and supervision of his working staff.[12]

If these premises be granted, the decision to exempt the employer (in reality, his insurer) from liability for his servant's breach of a statutory duty in the circumstances of the instant case may well be regarded as an unwelcome departure from the well-settled foundations on which the principle of vicarious liability has come to rest. It withholds all legal incentive to induce the employer to ensure strict observance of safety standards, reinforced by well-founded doubts whether he need even direct the foreman's attention to the existence of safety regulations and require him to observe them.[13] A foreman is a poor substitute for the employer as a guarantor of the safety of his workmates, both from the point of view of accident prevention and as a source of recompense. The statutory policy underlying the enactment of safety regulations is thus directly jeopardised and, if the instant

[10] [1951] A.C. 639, at 671 and 659 respectively. But Lord Reid (diss.) seemed inclined the other way (at 687–688). Lord Porter expressly declared the question as still open in *National Coal Board* v. *England* [1954] A.C. 403, 415.
[11] [1949] A.C. 155.
[12] See Fleming, *Law of Torts*, 354–355.
[13] *Per* Webb J. [1957] A.L.R. at 513; 31 A.L.J. at 213.

decision should prove the final word on this matter, its effect in the industrial sphere will have to be speedily neutralised, as it undoubtedly will be, by a good deal of legislative redrafting.

J. G. Fleming.

JUS QUAESITUM TERTIO

Folk wisdom warns us against over-simplifying our problems by seeing everything in black and white and forgetting the greys and colours of the real world. Yet both common sense and philosophical analysis teach us that simple division by two is a valuable method to employ in problem solving, and one which we employ whenever we ask whether a proposition is true or false. William James has divided all mankind into the tough-minded and the tender and has clustered other attributes, such as empiricist and pessimistic on the one hand and rationalistic and optimistic, around these leading characteristics. Gilbert has similarly divided men and women into liberals and conservatives, and another lawyer, Sir Frederick Pollock, has told us that judges are men of valour or men of caution. We tend to think of the liberal judge as one who is prepared to speak of justice, and ready to depart from old formulations of the law. But our method of simple division sometimes breaks down. An instance has occurred in the decision of that liberal court, the High Court of Australia, in *Wilson* v. *Darling Island Stevedoring and Lighterage Co., Ltd.*[1] where the court divided three to two over the limits of the *jus quaesitum tertio* and the authority of *Elder Dempster & Co., Ltd.* v. *Paterson, Zochonis & Co., Ltd.*[2] The majority thought that justice required the application of the old rule of the common law which denies third parties rights under a contract, and also required that limited effect be given to the earlier decision of the House of Lords.

The facts can be simply stated. Goods were shipped to Sydney under a bill of lading, governed by English law, which contained the clause: "Goods in the custody of the carrier or his agents or servants . . . after discharge . . . are in such custody at the sole risk of the owners of the goods and the carrier shall not be liable for loss or damage arising or resulting from any cause whatsoever." The bill of lading which had been made out to the order of the consignor had been assigned to the plaintiff as consignees of the goods. The goods were discharged from the ship by the defendants, stevedores engaged by the ship, and in the process of stacking and storing the goods in the dock shed before delivering to the plaintiffs the defendants, by their negligence, damaged the goods. The question for the court was whether the

[1] (1956) 95 C.L.R. 43.
[2] [1924] A.C. 522.

defendants were able to rely on the exemption clause in the bill of lading, to which, of course, they were not parties. The High Court majority held that they could not.

The *Elder Dempster* case was decided in 1924, but a quarter of a century elapsed before it was generally recognised that it had made a breach in the doctrine of privity of contract. No reference was made to it by Cheshire and Fifoot until their fourth edition in 1956, and in that there is only the citation of the name in a footnote to the discussion of the doctrine of privity by Devlin J. in *Pyrene Co., Ltd.* v. *Scindia Navigation Co., Ltd.*[3] Judicial recognition was first afforded to the impact of the *Elder Dempster* case by the courts of New South Wales. In *Gilbert Stokes and Kerr Proprietary, Ltd.* v. *Dalgety & Co., Ltd.*[4] Owen J., and in *Waters Trading Co., Ltd.* v. *Dalgety & Co., Ltd.*[5] the Full Court, relying on the *Elder Dempster* case, held that stevedores were protected by an exemption clause in the bill of lading. These cases were overruled by *Wilson's* case. The majority of the High Court, however, do not purport to differ from the House of Lords: they merely purport to lay down the correct conclusions to be drawn from the *Elder Dempster* case.

It will be recalled that in the *Elder Dempster* case an Isherwood-type ship was used for the carriage of casks of palm oil, and the absence of 'tween decks contributed to the crushing of the bottom casks. The main question argued was whether the damage was caused by unseaworthiness, or by bad stowage in respect of which there was an exemption clause: it was held that the loss was caused by bad stowage. The exemption clause was contained in the bill of lading which stipulated in the ordinary way that "the shipowners" should not be liable for "any loss or damage arising from stowage." The ship was on time charter from the owners to the charterers, who had placed the ship in their Elder Dempster "line," and who had used for it the bill-of-lading form used for all their ships. The shippers sued both the charterers and the shipowners. It was conceded that the bill of lading was signed by the master on behalf of the charterers, and that "shipowners" in the bill referred to the charterers. The subsidiary question in the case thus arose since it was argued by the shippers that the shipowners were strangers to the contract of carriage. They were, it was claimed, liable in tort for the negligence of their servants, the master and crew of the ship, who had loaded it badly, and could not call in aid the exemption clause in the bill of lading. All five Law Lords, including Viscount Finlay who dissented on the main question, rejected this contention of the shippers and exonerated the shipowners. There was no lengthy discussion of this question in the speeches, but, nevertheless, there were some

[3] [1954] 2 Q.B. 402; [1954] 2 All E.R. 158.
[4] (1948) 48 S.R.(N.S.W.) 435; 65 W.N. 196.
[5] (1951) 52 S.R.(N.S.W.) 4; 69 W.N. 23.

differences as to the reasons which led to the conclusion that the shipowners could rely on the exemption clause.[6] These differences gave rise to consideration in *Wilson's* case of what was the rule of law established by the *Elder Dempster* case. The minority judges took the view of the effect of the *Elder Dempster* case thus stated by Williams J.: "A passage in the judgment of Scrutton L.J. in *Mersey Shipping and Transport Co.* v. *Rea, Ltd.*[7] would appear to sum up the position correctly: 'I think that the reasoning of the House of Lords in the *Elder Dempster* case shows that where there is a contract which contains an exemption clause, the servants or agents who act under that contract have the benefit of that

[6] Viscount Cave [1924] A.C. at p. 534: "It was stipulated in the bills of lading that the shipowners should not be liable for any damage arising from other goods by stowage or contact with the goods shipped under the bills of lading; and it appears to me that this was intended to be a stipulation on behalf of all the persons interested in the ship, that is to say, charterers and owners alike. It may be that the owners were not directly parties to the contract; but they took possession of the goods (as Scrutton L.J. says) on behalf of and as the agents of the charterers, and so can claim the same protection as their principals."

Viscount Finlay [1924] A.C. at p. 548: ". . . when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation on liability therein contained must attach, whatever the form of the action and whether owner or charterer be sued. It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading, in respect of all stowage, by suing the owner of the ship in tort."

Lord Sumner [1924] A.C. at p. 564: "It may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading. It may be, that the vessel being placed in the Elder Dempster & Co.'s line, the captain signs the bills of lading and takes possession of the cargo only as agent for the charterers, though the time charter recognises the ship's possessory lien for hire. The former I regard as the preferable view, but, be this as it may, I cannot find here any such bald bailment with unrestricted liability, or such tortious handling entirely independent of contract, as would be necessary to support the contention."

Lord Dunedin and Lord Carson delivered no reasoned judgments. Lord Dunedin merely agreed with Lord Sumner. Lord Carson agreed with Viscount Cave and Lord Sumner. It may thus be contended that Lord Carson impliedly denies that there is any disagreement between Viscount Cave and Lord Sumner on the subsidiary question. This is the view formed by Morris L.J. in *Adler* v. *Dickson*: "Lord Carson . . . did not consider there was any serious divergence between the reasoning of Viscount Cave and Lord Sumner." [1954] 3 All E.R. at p. 411 F. In *Wilson's* case Taylor J. explicitly denies "that there was any substantial departure between the views expressed by Viscount Cave and Lord Sumner. If there was any fundamental difference of opinion I have failed to observe it." (95 C.L.R. at p. 91.) Taylor J.'s reconciliation of the difference between bailment upon terms and acting as agent is that: "In neither case was there any tortious act occurring independently of the performance of the contract." (This is the principle of Viscount Finlay's speech.) But *Adler* v. *Dickson* [1955] 1 Q.B. 158 clearly shows the fundamental difference between the two principles. The bailment principle must be limited to the carriage of goods, while the agency doctrine could apply also to the carriage of passengers. In *Adler* v. *Dickson* an attempt was made to get the court to say that the master and crew of a ship could rely on an exemption clause in a passenger's ticket as a protection against an action for negligent injury to the passenger. It failed.

[7] (1925) 21 Ll.L.Rep. 375, at p. 378.

exemption clause. They cannot be sued in tort as independent people. . . .' " [8] The majority, however, held that no such wide proposition could be regarded as established by the *Elder Dempster* case, even if the proposition were restricted to exemption clauses contained in bills of lading.[9] This consideration of the effect of the *Elder Dempster* case is a contribution to the doctrine of precedent, particularly in relation to multi-judge tribunals. It was, however, conducted without any articulated consciousness of the fact that a problem in the general theory of precedent was involved: there was no reference to the juristic literature on the subject—there was not even reference to the case law on the subject.[10]

Important differences in reasoning are to be found in the two majority judgments delivered in *Wilson's* case. Kitto J. was unable to find in the exemption clause itself any indication of intention that the stevedores were to be protected. " The exemption provisions I have quoted certainly begin by stating that goods in the custody of the carrier or his agents or servants after discharge are in such custody at the sole risk of the owner of the goods, but this I read as intended to exclude the carrier only from the risk: for the sentence proceeds, without a break, to state as a consequence that the carrier—no mention being made of his agents or servants—shall not be liable for loss or damage. And clearly the implication of an exclusion on the part of the stevedores is not required in order to give the bill of lading business efficacy." [11]

[8] 95 C.L.R. at p. 62.

[9] Dowrick in his comprehensive survey of *A Jus Quaesitum Tertio by way of Contract* (19 M.L.R. p. 374) sets out a more limited general proposition as the one that Denning L.J. supports. His Example No. 11 is (*Ibid.*, p. 376): " When a *contract of carriage of goods by sea* is made, and the carrier issues a bill of lading containing exemption clauses, if the parties so intend, the rights thereto extend not only to the carrier but also to other persons engaged in carrying out the services provided for by the contract." The footnote to this example reads: " *Adler* v. *Dickson* [1955] 1 Q.B. 158, at pp. 181 and 184, *per* Denning L.J. [*Elder Dempster & Co.* v. *Paterson, Zochonis & Co.* . . .]. " The wording of the proposition is, however, Dowrick's: Denning L.J. sets out no such succinct and elegant formulation. Dowrick's phrase " if the parties so intend " is his rendering of the statement by Denning L.J. that the exemption clause was made for the benefit of the stevedores by necessary implication. It is doubtful whether Denning L.J. considered that the proposition was limited to a contract of carriage of goods by sea. As Fullagar J. points out in the *Wilson* case at p. 74 Denning L.J. had previously considered the *Elder Dempster* case in *White* v. *John Warwick & Co., Ltd.* [1953] 1 W.L.R. 1285; [1953] 2 All E.R. 1021. There he had said: " The decision, as I read it, was that when a party to a contract has deliberately in plain words agreed to exempt a third party from liability for negligence, intending that the third party should have the benefit of the exemption, he cannot go back on his plighted word and disregard the exemption. It is one of the cases where a third party can take advantage of a contract made for his benefit." [1953] 1 W.L.R. at p. 1294; [1953] 2 All E.R. at p. 1026B. In this dictum it will be noted that Denning L.J. does provide for the intention of the parties.

[10] For the literature see Paton & Sawer (1947) 63 L.Q.R. 462: Coutts (1948) 64 L.Q.R. 463: Lord Asquith 1950 J.S.P.T.L. 358: Montrose (1952) 2 West Aust. L.R. 521; Honore (1955) 71 L.Q.R. 196: Montrose (1956) 20 M.L.R. 128.

[11] 95 C.L.R. at p. 86. This passage does not contain the sole reason in the judgment of Kitto J. A fact which was material to him was that the plaintiff

Fullagar J., however, directed his judgment to the question of the general principle whether any clause in a bill of lading could protect the stevedores. At the end of his judgment he said: "In the view which I take, nothing turns on the construction of the particular bill of lading in this case." [12] In his view, opposed to that of Kitto J. and also to that of Denning L.J. in *Adler* v. *Dickson*, whether A stipulates with B that he will not be liable for the negligence of his servants or agents or whether A stipulates with B that neither he nor his servants or agents are to be liable for negligence, the contract does not protect the servants or agents from an action against them by B for their negligence.[13] The servants and agents are strangers to B's contract, and the exception to the general doctrine established by the *Elder Dempster* case is a very limited one confined to the owners of a chartered ship.

The inquiry by Fullagar J. as to the effect of the *Elder Dempster* case is carried out at two levels. The first is concerned with the actual reasoning in the speeches, the second with the subsequent "interpretations" [14] of the case. Of the dictum of Lord Sumner that "in the circumstances of the case the obligations to be imposed from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading" he says this "must be regarded as stating the *ratio decidendi* of the *Elder Dempster* case." [15] His reasoning for this conclusion is that not only Lord Dunedin but also Lord Carson agreed with Lord Sumner, so that there were more in favour of Lord Sumner's view than of any of the others. It can also be seen that only Lord Sumner's view had the support of a majority of the Lords. An inarticulate premiss of this reasoning derived by a process of generalisation is that where the judges of a multi-judge tribunal propound different rules of law as the basis of their decisions, only that rule of law supported by a majority of the judges is binding on subsequent courts.[16]

was the consignee of the goods and, of course, it is the consignor who enters into the bill of lading contract with the shipowner. The defendants, he said, had to take two steps: (i) they had to show that the consignor agreed that stevedores should be protected; (ii) they had to show that the consignee also agreed. He thought they failed on both. It is doubtful whether the second step is necessary, since the consignee under a bill of lading is bound by the contractual terms of the bill by virtue of the Bills of Lading Act, 1855, which presumably applies also in New South Wales.

12 95 C.L.R. at p. 79.

13 95 C.L.R. at p. 70.

14 "It seems to me to have received quite a number of interpretations." 95 C.L.R. at p. 74.

15 95 C.L.R. at p. 69.

16 If, as I have recommended elsewhere, the phrase *ratio decidendi* be restricted to to the rule of law propounded by a judge as the basis of his decision, the proposition can be stated in the form that the *ratio decidendi* supported by the majority of a multi-judge tribunal is binding on subsequent courts. It would appear that Fullagar J. used the phrase *ratio decidendi* to mean the rule of law for which a case is authoritative. The language of "the *ratio decidendi*

But the process of generalising leads to a choice of propositions according to which details of the particular case are omitted in the generalisation.[17] Fullagar J. shows that the interpretations that the *Elder Dempster* case has received consist in three different generalisations. The first is the general proposition of the American Agency Restatement that an agent is entitled to the immunities of his principal.[18] The second is a general principle of the law of bailment that a bailment may be upon terms agreed upon between the bailor and a third person. The third is the wider principle that parties to any contract can exempt a third person from liability in doing acts defined by the contract. Fullagar J. rejected all of the generalisations. "None of them appears to me to have any sound legal basis and I suspect they would have filled Lord Sumner with amazement."[19] He laid great emphasis on Lord Sumner's reference to "the circumstances of the case," and limited the authority of the *Elder Dempster* case to "the very special and peculiar relationships which are created when goods are consigned to be carried on a chartered ship." The master in the *Elder Dempster* case, it was conceded in that case, had signed the bills of lading on behalf of the charterers. Fullagar J. did not accept the view that the master when he received the goods received them on behalf of the charterers. Of course if he had done so then no question of the liability of the shipowners would have arisen. The master received the goods as servant to the shipowners. But he said: "In my opinion, what the *Elder Dempster* case decided, and all that it decided, is that in such a case the master having signed the bill of lading, the proper inference is that the shipowner, when he receives the goods into his possession, receives them on the terms of the bill of lading."[20] This is perhaps rather a restricted interpretation of Lord Sumner's statement, but it is clearly intended as a restatement of Lord Sumner's view. Fullagar J. therefore must be counted as an adherent of the doctrine that the actual reasoning of a judge is determinative of the authority of case.

of a case" is, in my opinion, not convenient. See my article on *Ratio Decidendi and the House of Lords*, particularly p. 129, note 26: and for a fuller discussion on the ambiguity of the phrase, *The Language of Precedent*, 2 West.Aust.L.R. at p. 323.

17 *Cf.* Stone: *Province and Function of Law*, Art. 23, p. 186.

18 Fullagar J. points out (95 C.L.R. at p. 70) that a stevedoring company is not the agent of the shipowner but an independent contractor. In *Mersey Shipping & Transport Co.* v. *Rea* (1925) 21 Ll.L.Rep. at p. 378, Scrutton L.J. laid down the wider rule that if A agrees to do work for B on condition that he is not to be liable for negligence, and C is engaged by A (whether as a servant of A or as an independent contractor with A) to do the work, C will not be liable to B in tort if his own personal negligence causes damage to B. It will be recalled that the minority judges in *Wilson's* case accepted a narrower rule confined to agents as the basis of the *Elder Dempster* case: see *supra* n. 8. Even this narrower rule had been rejected in *Gilbert Stokes and Kerr Proprietary, Ltd.* v. *Dalgety* (*supra*, n. 4). It was also rejected by Jenkins L.J. and Morris L.J. in *Adler* v. *Dickson*, see [1954] 3 All E.R. at p. 409D and p. 412D.

19 95 C.L.R. at p. 75.

20 95 C.L.R. at p. 78.

In his view Lord Sumner's *ratio decidendi* contains no exception to the general doctrine of an absence in English law of a *jus quaesitum tertio*. Lord Sumner found as an inference of fact that the contract between the shipper and the shipowner contained an exemption of liability for bad stowage, and in holding that the shipowner was not liable, he merely applied the terms of the contract made by the parties. In *Wilson's* case no inference of fact could be made that either the consignor or consignee had agreed with the stevedore that there should be no liability for negligent stacking or storing.

J. L. Montrose.

REVIEWS

Fraud in Equity. By L. A. Sheridan. [London: Sir Isaac Pitman & Sons, Ltd. 1957. xliii and 235 pp. 40s. net.]

This book is an abridged version of Professor Sheridan's thesis for the degree of ph.d. The author has divided the work into four parts, but it falls naturally into two main divisions. The first three parts, about two-thirds of the book, are devoted to a careful examination of the cases on fraud in equity, the classification being based on Lord Hardwicke's judgment in *Earl of Chesterfield* v. *Janssen* (1751) 2 Ves.Sen. 125: the fourth part consists of an analysis of what has gone before with a view to ascertaining "the meaning, classification, and distinguishing features of equitable fraud."

Part I deals with actual fraud, and contains a chapter on "fraudulent dealings with property" which was thought by your reviewer to be the least satisfactory in the book. Apart from "a lexical note on 'surprise,'" this topic is dealt with under the heads of "Constructive Notice" and "Legal Owner's Loss of Priority." Under the first head, the question under consideration is whether a subsequent purchaser is bound by some prior equitable interest. The relationship between the doctrine of notice, and the effect of fraud and gross negligence is not made clear. It is submitted that the basic principle is that (apart from registry provisions) a subsequent purchaser is normally bound by all equitable interests of which he has notice, whether actual or constructive; and that the question is not whether he has been fraudulent or grossly negligent in making inquiries, but whether he has made the usual and proper inquiries in the circumstances, a wider question which must, I think, include within it all cases of fraud or gross negligence. The cases on fraud or gross negligence are, it is submitted, an anomalous but settled exception in favour of the purchaser in relation to dealings with title deeds. Where the matter involves failure on the part of the purchaser to make any or sufficient inquiries as to the title deeds, it seems that only fraud or gross negligence will postpone him, though there be present circumstances which in any other type of case would be treated as giving rise to constructive notice. This view of the matter may be mistaken, but there are difficulties, and a discussion of them would have been useful.

Under the second head, the problem which is considered is what circumstances will postpone a person who not only has the legal estate but has also got priority in point of time to a subsequent equitable incumbrancer. The reference to *Hunt* v. *Elmes* (1860) 2 De G.F. & J. 578 is somewhat misleading: the facts there were that the mortgagor was in fact, unknown to the mortgagee, the mortgagee's own solicitor, and the mortgagee was held not to be negligent in relying on his own solicitor on the not unreasonable assumption that the mortgagor was an independent third party. More generally it may be doubted whether *Northern Counties of England Fire Insurance Co.* v. *Whipp* (1884) 26 Ch.D. 482, does in fact, as Professor Sheridan states, represent an ample summary of the law on this subject. In *Whipp's* case, Fry, L.J. pointed out that there were two types of case (i) where the legal mortgagee failed to obtain the deeds and (ii) where, having obtained them he afterwards parted with them, and he said that in both cases fraud alone would cause postponement. As to (i), owing to registration the case can hardly arise since 1925, but it is submitted that there is no real doubt but that the law was settled that not only fraud but also negligence in failing to obtain the title deeds would postpone even a legal mortgagee to a subsequent equitable incumbrancer. (See *Colyer* v. *Finch* (1856) 5 H.L.C. 905; and *Walker* v. *Linom* [1907] 2 Ch. 104 applying the principle of *Oliver* v. *Hinton* [1899] 2 Ch. 264.) As to (ii), which

may still arise, as it is doubtful whether a mortgage with a deposit of deeds is a puisne mortgage and registrable as such even after the mortgagee has parted with the deeds, on general principles of precedent *Whipp's* case should still represent the law: many writers have, however, adopted the view of Parker J. in *Walker* v. *Linom* (*supra*), that the principle of *Oliver* v. *Hinton* (*supra*) applies to all cases in which the postponement of a legal mortgage is in issue, *i.e.*, gross negligence is sufficient in this case also.

Putting these criticisms in perspective, however, and looking at the broad picture, the first three parts of this work give a fuller and more accurate idea of what is meant by the term "equitable fraud" than any other available source. Part II dealing with inequality of parties and unconscionable bargains, which occupies a third of the whole book, is particularly valuable. This part includes a consideration of undue influence, breach of fiduciary duty and fraud on a power and an especially interesting chapter on catching bargains with expectants. Part III is the shortest part, and consists of a consideration of the maxim that equity will not allow a statute to be used as an instrument of fraud.

Turning briefly to the second main division, the most useful practicable definition which is put forward is in effect a summary of the different classes of case reviewed in Parts I, II and III of the book. This is, perhaps, description rather than definition: but it would be hard to improve upon it as an explanation of the content of equitable fraud. A shorter alternative definition is submitted but, like definitions of negligence by reference to a duty of care, it is not very satisfactory as it merely puts the inquiry one stage further back. As Professor Sheridan says, the longer the definition the more useful it is.

On subsidiary matters the book deserves high marks. I only noticed one misprint: the index is adequate: the tables of cases and statutes are all they should be: and the table of law reports and abbreviations used contains also the dates of the various reports—a good idea that has not previously come to my attention.

Philip H. Pettit.

The Law Relating to Charities in Ireland. By V. T. H. Delany. [Dublin: Alex Thom & Co., Ltd. 1956. xxxi and 253 pp. £3 net.]

A Handbook on the Administration of Estates Act (Northern Ireland), 1955. By William A. Leitch. [Belfast: Incorporated Law Society of Northern Ireland. 1956. xix and 228 pp. £2 5s. net.]

Anyone who read Dr. Delany's masterly survey of the development of the law of charities in Ireland in the *International and Comparative Law Quarterly* a couple of years ago will know what to expect of his book. *The Law Relating to Charities in Ireland* is another masterly survey, of English and Irish law, and will be of use on both sides of the channel. Dr. Delany has the technique of combining concision and comprehensiveness. Within the covers of a fairly small book, he has explored the mysteries of charity law from definition to taxation, and from its speculative beginnings to its modern ramifications.

Irish law is basically the same as English law. It is, in fact, English law emigrated, developing sometimes to suit the local conditions to which it has been transplanted, yet constantly aware of developments in its domicile of origin. In no branch of Irish law is it possible to practise or write or teach without constant reference to English authorities. But sometimes the general identity of English and Irish law has been allowed to obscure the existence of

differences, and English textbooks have occasionally been guilty of treating divergent Irish cases as "wrong," or of citing individual Irish cases by way of contrast to English authorities without awareness that there is a whole line of Irish decisions begetting a divergent principle. For these reasons, among others, the appearance of a textbook written from the Irish point of view is welcome.

Charity law has its share of divergence between England and Ireland. It should be expected, indeed, to reflect different social factors more quickly than many other branches of law, for what is charitable must be for the public benefit, and the publics of various countries are not necessarily benefited by the same things. Especially obvious in this context is the influence of religion. Dr. Delany brings out these differences, and one feels he is at his best when dealing, for example, with Masses for the dead or societies of contemplative nuns.

The Law Relating to Charities in Ireland is essentially an exposition of the law as it is, seen through the authorities, and how it got there. Dr. Delany has excluded criticism from his scope, except in a few minor instances. This is disappointing, as charity law is so eminently criticisable. The charity muddle is as great in Ireland as in England, and no doubt includes proportionately as much arbitrary injustice. But this disappointment should not hide the immensity of the achievement in having charted a fresh way through charity law at all, and through Irish charity law especially, and with completeness, precision, and lucidity. This book will not claim a place among the great works of modern legal literature, but it will be very useful. By prevailing standards, that is saying quite a lot.

Recently there has been an upsurge in Irish legal literature. Books on Irish law have always been rare, but the first half of the present century produced them at a much slower rate than the nineteenth. Possibly this was partly due to the increase of periodical publications, and some blame could be cast on partition too. A book on the law of Northern Ireland does not look like an economic proposition. But the 1950s have acquitted themselves well. Many new books have devoted special attention to Ireland, and now it is possible to greet two new books on Irish law in one review—one of them exclusively devoted to Ulster. For this latter work we have to thank a combination of the reforming zeal of the Northern Ireland Parliament, the erudition of their Parliamentary Draftsmen's Office, and the sense of responsibility of their Law Society.

The Administration of Estates Act (Northern Ireland), 1955, at last assimilates the rules for intestate succession to all realty with those applying to personalty. Agricultural and pastoral land which changed hands under the Land Purchase Acts has devolved as personalty since 1891, and now the single system is made applicable to all property except fees tail and entailed interests. In addition, the Act brings the Northern Ireland scheme of distribution closer (but not right up to) that now pertaining in England, and makes many detailed amendments.

Leitch's *Handbook* is mostly an annotated edition of the Act. The text of each section is set out, and then there is explanatory matter. The annotations are extensive, covering more space than the reproduction of the legislation, and they are thorough, scholarly, and practical. In a word, Mr. Leitch's work is excellent. One cannot say the same for all parts of the Act, but that is no fault of the book.

Besides the examination of the Act itself, there are a general note on its historical background, a chapter on the enabling provision (The Northern Ireland Act, 1955), and several appendices of rules of distribution, precedents, and the Land Registry Rules. Anyone in Northern Ireland or elsewhere who might conceivably have to handle an estate affected by the law of the Province should regard the *Handbook* as his bible *ad hoc*. There is much more of general interest on Irish property law besides.

L. A. Sheridan.

Family Cases in Court. By Maxine Boord Virtue. [Duke University Press, Cambridge University Press, London. 1956. xxxvii and 290 pp. 30s. net.]

In England, when proposals are made for reform of the divorce law, the Government of the day appoints a Royal Commission, under the chairmanship of a Lord of Appeal in Ordinary from the Chancery Bench, consisting of two English and two Scottish practising lawyers and fourteen other persons, only one of whom appears to have wide experience of the practical functioning of family law, and none is engaged in academic study of the questions involved. This commission receives evidence from various interested persons and bodies, but neither undertakes nor sponsors any research into the workings of the existing system, and after four and a half years produces a report containing only such factual information as results from practice on the Bench or at the Bar, or has been thrust upon it from outside.

In the United States, the American Bar Association sponsors an Inter-professional Commission on Marriage and Divorce Laws, which includes amongst other persons five Professors of Law or Sociology and two practising lawyers. As a first step in its inquiries, this body sends its Executive Secretary, who is both practising lawyer and university lecturer in social work, to study the organisation and procedure of courts handling family cases in various American cities and states. This book records the results of her study. To consider comparative organisation and procedure as a matter preliminary to and separate from the reform of the substantive law seems an admirable approach; a supply of facts rather than a muster of preconceived ideas may also find its defenders, even in this country.

The range of standards disclosed by Mrs. Virtue's study of courts in action is very considerable, from the high peak of Ohio to the depths of Illinois in general and Chicago in particular; and although the reader is assured that no attempt has been made to examine the total structure or operation of any court, or to evaluate the quality of any system of procedure, the author's estimate of both structure and procedure is made fairly clear, particularly in the chapters summarising her impressions of the various jurisdictions and drawing conclusions.

Apart from its value to those considering the subject in the United States, however, the book contains much to interest the student of English family law. He may at times congratulate himself that his courts are not as those of other common law jurisdictions, in that judges do not, for example, feel "free to move on and off the bench, to discuss other matters with other attorneys, to retire to Chambers, or to receive personal callers and newspaper reporters while witnesses are testifying in default cases," as does the divorce judge in circuit court in Chicago (p. 91). Nor is the practice, adopted in San Francisco, of causing petitioner and defendant to occupy adjoining witness chairs in a proximity that serves only to exacerbate their mutual hostility (p. 28) likely to commend itself here. The two hours' bullying cross-examination which Mrs. Virtue heard in a bastardy case in the same jurisdiction (pp. 39–42) would probably be impossible before a mixed bench of lay magistrates here, though one wonders if something approaching it might not sometimes be heard before a stipendiary or metropolitan magistrate. Nor has the right to prompt divorce ever attained in this country the status of one of the inalienable rights of man, to which it appears to have been elevated in Illinois by the decision in *Christiansen* v. *Connell,* 2 Illinois (2) 332.

But the vast majority of the problems discussed exist in similar forms on both sides of the Atlantic. Thus in Chicago, "matters affecting children of divorcing parents are raised as, and only as, the litigants present them"; in England, even under rule 56 of the new Matrimonial Causes Rules, 1957, the court may only order separate representation of children on the application

of the Official Solicitor or some other proper person. "The temporary overwhelming of love for child by hate for spouse is a major problem for courts, for divorce litigants, and for society," in England as in America (p. 232). In England also the courts, having somewhat belatedly discovered the bond normally existing between mother and young child, appear (as in Chicago) "to operate on an all but irrefragable presumption that the welfare of the child is to be equated with the mother's custody" (p. 101). In Chicago, the wife was found to waive alimony in 93 per cent. of 12,000 divorce cases examined (p. 92) and the difficulty of persuading hostile spouses that they literally cannot afford to live as divorced persons is encountered in Indianapolis (pp. 150–151). In England also, wives exaggerate their capacity to maintain themselves and their children, and recent decisions that the National Assistance Board is not bound by the wife's waiver of maintenance deal only with the most extreme cases. In England, as in the United States, the judges dislike dealing with divorce cases, and pass them on to temporary judges as frequently as possible (pp. 131, 141, 143 *et alia*) and in England, as in the jurisdictions here examined, courtrooms are often dirty, antiquated and inconvenient.

Practical experience shows that the provisions in Indiana, that a husband may be required to pay all reasonable expenses incurred by his wife, regardless of the outcome of the divorce action or the degree to which the wife is at fault, is preferable to the law of Illinois "which by making support and suit money for the wife conditional upon her freedom from guilt, contributes to heated squabbling and grave accusations between parties and counsel" (p. 119). There is no indication that such considerations were borne in mind by the six members of the Royal Commission who "think it wrong in principle that a husband or wife should be called upon to maintain a guilty spouse," (Cmd. 9678, para. 503) irrespective of the highly technical criterion of "guilt" as in many cases of desertion.

It may appear that some of the American courts tend towards too much of a good thing, as in Toledo, where twenty-eight employees with special skills are available to the jury in any divorce case involving children; or in Indianapolis, where one thirteen-year-old girl is instructed to report to the judge if at any time she becomes dissatisfied with the arrangements for her custody, and an order is made that another family of three children is "to have immediate access to the judge at any hour of the day or night they wanted to talk or to come to him" (p. 162). Mrs. Virtue's comments may sometimes strike a similar note of exaggeration, but on the whole she is sensible and cautious. She has produced an informative and thought-provoking book.

O. M. Stone.

The County Court Pleader. By E. Dennis Smith, ll.m. Third edition. [London: Sweet & Maxwell, Ltd. 1957. lxiv and 711 pp. £3 10s. net.]

This is the third edition of a book whose scope is accurately defined by the title and sub-title: *The County Court Pleader, with Precedents of Claims and Defences.* Its importance, always considerable, is emphasised by the enlargement of the jurisdiction of county courts.

The precedents of pleadings are prefaced by a general introduction of thirty-one pages concerning jurisdiction, parties and procedure. The author's aim, an intention which has been executed, has been to set out succinctly and clearly the relevant principles and authorities for his propositions. The student or young articled clerk may, however, be slightly confused by the section on interlocutory matters; although the author has pointed out, some eleven pages before, that the registrar has jurisdiction in interlocutory matters, when he comes to set out what those interlocutory matters are he adopts the practice of the

White Book and refers to "the court." Although the practitioner does not need to be told that in that context "the court" does not mean the judge sitting in court but the registrar in chambers, the student would appreciate a footnote.

The greater part of the book is occupied by the precedents. Some practitioners, of course, will prefer their own, but the precedents suitable in cases of an unusual nature will always be of value. The practitioner will welcome, in particular, the precedents called for by recent statutes such as the Hotel Proprietors Act, 1956. This volume, which boasts, incidentally, a model Table of Cases, may be warmly commended to practitioners.

Allister Lonsdale.

The Quantum of Damages. Volume 2. Fatal Injury Claims. By David A. McI. Kemp and Margaret Sylvia Kemp. [London: Sweet & Maxwell, Ltd. 1956. xx and 326 pp. 32s. 6d. net.]

This is a companion to the authors' *Quantum of Damages in Personal Injury Claims*, and it is intended henceforth to distinguish the two books as Volumes 1 and 2 of *The Quantum of Damages*. It has much the same merits and defects as its predecessor.

On the credit side, the authors have again put the profession in their debt by collecting and collating many decisions on the quantum of damages in fatal accident claims which—but for their enterprise and industry—would have remained unknown and hardly accessible in the Bar Library. They discuss a number of interesting problems, such as (on pp. 15–17) the complications which ensue where insurance moneys, which under the Fatal Accidents (Damages) Act, 1908, are not to be taken into account in assessing damages, affect the incidence of estate duty, and the difficulties which may arise (as in the unreported case of *Brennan* v. *Richard Johnson & Nephew, Ltd.*, 1952 C.A. No. 18) when a claim is brought under both the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, and the estate of the deceased may have to be shared with a non-dependant.

On the debit side, they have again produced a book which is longer than it should be. Not nearly enough use is made of that invaluable device, the series of dots, to mark the omission of an immaterial passage. Thus pages 107–110 are taken up with that part of a judgment which evaluates the evidence on the contribution made by the deceased to his mother's household in the particular case—a matter of no such general interest or principle as to warrant verbatim reproduction. A dozen lines of footnote on pp. 156–157 are devoted to the repetition of a quotation which appears in the text on p. 142. The eleven-line footnote on p. 263, citing sections of the Fatal Accidents Act, 1846, appears appropriately enough in the *Law Reports*, but it is hardly necessary to reproduce those sections, in conjunction with the report of the case, in a book on the Fatal Accidents Acts where they are discussed *passim*. The footnote on p. 320 ("The purpose of having various tables with the £ shown as 100 at various dates is to enable rough comparisons to be made at a glance without the need of detailed calculation") does scant justice to the intelligence of the reader. And is it really helpful—in the text (p. 180) of a book designed for lawyers—to refer the reader to an article entitled "The price of gold and the purchasing power of the pound sterling" in the *Journal of the Royal Statistical Society*?

The authors could play their own part in the fight against inflation if in their next edition they were to combine their two books into a single volume, in which—by judicious pruning and the substitution of cross-reference for repetition—the total length (nearly 800 pages) of the two books could be easily cut down by a quarter or a third.

G. Ellenbogen.

Guide to Security of Tenure for Business and Professional Tenants. By Deborah Rowland. With a Prefatory Note by Harold Christie, q.c. [London: Pergamon Press, Ltd. 1956. xix and 253 pp. 35s. net.]

Tenants of shops or offices who formerly looked with envious eyes at the security of tenure and the control of rent granted to the tenants of dwelling-houses found similar privileges granted to them by the Landlord & Tenant Act, 1954. A sufficient time has now elapsed for an estimate to be made of the manner in which the Act is to be interpreted, and some thirty-one cases, decided in 1955 or 1956, are referred to.

The book contains ninety-seven pages of text followed by one hundred and thirty-six pages in which are set out the Act, statutory instruments, and forms. The text is sufficiently detailed for the layman who requires a "Guide" which sheds considerable light upon what must appear an unpleasantly complicated subject. But it is doubtful whether he will appreciate the luxury of the one hundred and thirty-six pages of Appendices, at an appropriate cost. The lawyer, on the other hand, will find that although much hard work has gone into the book, it is not sufficiently detailed for his purposes.

Allister Lonsdale.

Proxy Contests for Corporate Control. By Edward Ross Aranow and Herbert A. Einhorn. [Columbia University Press. London: Oxford University Press. 1957. xxiii and 577 pp. £6 net.]

The spate of "take-over bids" which has been a conspicuous feature of company practice in Britain during the past few years is but a feeble trickle in comparison with the spectacular flood in the United States. There the technique differs somewhat from that most commonly employed here. The general offer to the shareholders is used comparatively rarely in the case of large publicly owned corporations, the normal practice being to acquire by separate purchases an appreciable block of voting stock and then to seek to oust the existing directors at a general meeting. It is with the legal and practical considerations applying to the resulting "proxy contest" that this fascinating book is concerned.

The authors are two practising attorneys who have acted for the existing management or for the insurgents in a number of bitterly contested proxy fights. They bring to their subject a knowledge, based on personal experience, of strategy and tactics as well as of the legal rules. The result is a book which will clearly be invaluable to American practitioners; indeed it has already been favourably received and extensively cited in the States. It is also of absorbing interest to English readers. Here practitioners will find persuasive answers to many of the problems with which they will be faced during the course of the increasingly common battles for corporate control. Here, too, those who wish to study likely trends of development in company law and practice will find much food for thought. And, finally, sociologists and economists will here find an illustration of the practical working of American Capitalism at its most typical.

The major reflection of all these classes of British readers will be of the infinitely greater extent to which company meetings and proxy solicitations are subject to legal regulation. In the case of companies with quoted shares the provisions of the Securities Exchange Act, 1934, and the frequently revised regulations made thereunder lay down a set of "Queensberry rules" for proxy fights which are in striking contrast with "free-for-all" still allowed in *laissez-faire* Britain. Before entering the ring each side has to file with the

Securities and Exchange Commission (whose chairman contributes an admirable introduction to the book) a detailed proxy statement giving full information about the company and the existing management and about the insurgents who are seeking control. Thereafter all campaign material has to be cleared by the S.E.C. before it is used. In this book can be found an up-to-date account of these rules and a discussion of the many decisions on them.

The book is, however, concerned with much more besides the S.E.C. rules. In Part III there is a most useful account of the conduct of meetings and of the election of directors. Those interested in future trends should pay particular attention to the discussion of cumulative voting (a device as yet unknown in Britain but one which may well spread here as it already has to Canada) and of Inspectors of Elections (about whose functions there is already a considerable body of law). Of particular interest, too, is Part V, dealing with the recovery of proxy contest expenses—another problem which may well become a live one in Britain before long.

No one should miss the first chapter of the book—on Preventing, Anticipating and Preparing for a Proxy Contest. This may prove slightly shocking to those accustomed to the British pretence that everybody concerned with corporate management is imbued with disinterested altruism. There is no nonsense like that about Messrs. Aranow and Einhorn. With deadpan seriousness they explain the strategy and tactics which the "ins" should follow to keep in the saddle and which the "outs" should adopt to boot them out.

This is a thoroughly refreshing and stimulating book and excellently written throughout.

L. C. B. G.

A Comparison between the English Private Company and the Swiss Société à Responsabilité Limittée. By Dr. Roger Anker, Avocat. [Switzerland: Bienne. 1956. xiv and 84 pp.]

This booklet deserves to be drawn to the attention of the English profession. It is a discussion, written in excellent English, of the evolution of the English private company and of the comparable Swiss institution. Dr. Anker knows his subject and his comparative treatment is illuminating. The English reader is likely to learn much about his own type of association and will also find a clear account (in his own language) of an association which has played an influential role on the Continent.

It is Dr. Anker's misfortune that his thesis was completed in 1953 but has only just been published. But nothing of great moment has occurred in the interim and this little book can be most cordially recommended.

Il Fallimento nel Diritto Americano. By Dr. Guido Rossi. With Preface by Professor Mario Rotondi. [Padova: Cedam. 1956. xxiv and 247 pp. Ital. L. 1,500.]

Though the title "Bankruptcy in American Law" modestly conceals it, this book is much more than a concise description for Italian readers of the principles of present American bankruptcy law. It traces American and, to a great extent, English law in the field of failing debtors through both the common law and statutory phases of its development. It tries to explain the evolution of this law step by step both vertically in historical sequence and horizontally by constant comparison with the contemporaneous changes in other countries, especially in Italy, but also elsewhere as in Scotland, Canada, Germany, Spain, South America, etc.

Bankruptcy law, having been everywhere a part of the law merchant, quite naturally tends toward far-reaching interrelations, though its statutory treatment has brought about cleavages in technique. The very word "bankruptcy," which probably originated in a local Italian statutory rule of breaking the trading bench of the fugitive debtor, indicates the strong supra-national aspects of this branch of the law. Therefore, the historical-comparative approach appears eminently suited and makes this book so interesting for the Anglo-American jurist, even though he can of course find in his national literature far more detailed representations of the present American or English bankruptcy law.

In the first, prevailing historical, chapter the author defends convincingly his thesis that Anglo-American bankruptcy has its origin not in the *cessio bonorum* of early Imperial Roman law, but in the statutes of the medieval Italian city states, a feature which it shares with another branch of the law merchant, the law of negotiable instruments. He sees the connecting link in the strong penal character common to both the initial English bankruptcy legislation and the oldest Italian statutes, but alien to the *cessio bonorum,* which was inspired rather by the idea of *favor debitoris.* The adoption of another principle of Italian statutory law merchant, namely that of the *par condicio creditorum* is due to the common law need to eliminate the "race of diligence" which resulted from the wide application in the common law of the rule *prior tempore, potior jure.*

Rightly, the author pays much attention to the Anglo-American institution of the discharge, which represents such a strong deviation from the common ground with European continental bankruptcy law. Correctly he stresses its importance in his careful exposition of the relation between the American Federal bankruptcy law and state insolvency regulations. He probably goes too far when he claims that American case law makes the presence of discharge provisions in such regulations the exclusive criterion for their compatibility with the Federal law: In *Re Wisconsin Builders' Supply Co.,* 136 F.Supp. 439 (E.D.Wisc. 1955), reversed on other grounds 239 F. 2nd 649 (7th Cir. 1956). The author's theory that the creation of voluntary bankruptcy in the American Bankruptcy Act of 1841 is closely connected with the discharge feature, known before and greatly enlarged in that Act, is persuasive. Less persuasive appears the repeated attempt to establish the discharge as a consequence of the common law system under which bankruptcy deprives the debtor of the title to his assets. In the end, the author admits the importance of the "meta-juridical" reason, stressed so much in American law, namely, to give the debtor a fresh start and re-introduce him into the general economy.

The presentation of the various phases of American bankruptcy (prerequisites, adjudication, effects, distribution) is concise, always amply documented, intelligently compared with other laws and very clear even when dealing with topics as complicated as preferences under the 1950 amendment to section 60 of the Bankruptcy Act.

True, there are a few flaws, for example: technically a person is a bankrupt from the filing of the petition as now established in section 1, No. 4 of the Bankruptcy Act (p. 82, note 16); creditors whose claims are not based upon a written contract are not excluded from voting (p. 106); the time for raising objection to the discharge is stated incorrectly (p. 147); the relation between turnover order and non-adverse possession and its enforcement through civil rather than criminal contempt proceedings are not very clearly treated (pp. 92, 141, 142). But these are minor points.

The book also deals with composition procedures and corporate reorganisation. In its final chapter it takes up some problems of conflict of laws in bankruptcy. Here, the author draws rather heavily on the recognised writings of Professor K. H. Nadelmann, of Harvard and New York University, who, according to the preface, has been a faithful mentor throughout the composition of this very valuable book.

Sigmund A. Cohn.

The Problem of the Monetary Unit. By Karl Olivecrona. [New York: The Macmillan Company. 1956. 185 pp. $3.]

The author of this remarkable book is a Professor of Law at the University of Lund in Sweden. In 1953 he published in Sweden a study on the problem of the monetary unit. A substantially re-written version has now been made available in the English language.

For very many years economists and, to some extent, lawyers have endeavoured to find a definition of what has proved to be one of the most elusive conceptions, the monetary unit. In a negative sense a considerable degree of agreement has been reached. In particular, we know that the monetary unit such as the pound or the dollar or the krona is *not* a quantity of metal or a specific measure of purchasing power. But we are far from clear when it comes to explaining affirmatively what it is that the monetary unit represents. It is an interesting question, though its practical importance is limited. Professor Olivecrona has tackled it with great acumen and learning and a display of logic and verbal arguments which are impressive, but at the same time likely to strengthen the English lawyer's determination to solve the problem empirically rather than dogmatically. The author's fundamental thesis is the "nothingness of the monetary unit" (p. 120). As he recognises, in essence this is neither revolutionary nor new, though the formulation is striking. But, as Professor Olivecrona also recognises, "the practical consequences are what captures the interest" (p. 121). They centre around two questions: If the monetary unit signifies no object at all, what is the sense of a promise to pay and what is the sense of measuring values in monetary units? It is perhaps open to doubt whether the learned author has succeeded in throwing new light upon these matters. Thus he concludes that "the monetary unit has one basic function only. It is the unit in which debts are expressed, the nominal unit on which the great game of money is based" (p. 159). It is possible that such a submission is of greater interest to economists than to lawyers. But even the latter, if they are attracted by the theory of monetary law, will find it a stimulating experience to read Professor Olivecrona's work.

F. A. Mann.

Time for Loading and Unloading of Ships: A Comparative Study of English and Scandinavian Law. By Hugo Tiberg. [Oslo. Arkiv For Sjorett. 111 pp.]

Demurrage problems loom so large in the practical business of shipping that I have always been puzzled that there is no English textbook on the subject. It is true that there are excellent chapters in the leading textbooks on Shipping Law, but there still remains in my view a need for a comprehensive study of the subject.

Until that is forthcoming this little volume written by a young Swedish lawyer as a dissertation for his diploma in the University of London will do much to fill the gap, as it is in effect a study of the English law on the subject with notes concerning those aspects of the law where there are differences between our law and those of the Scandinavian countries. Although there is no uniform system of law in Scandinavia the codes relating to a number of branches of commerce, including carriage by sea, have been brought into conformity. Moreover the existence for fifty years or more of a system of law reports on maritime cases common to all the Scandinavian countries has enabled the courts to achieve a high standard of conformity. The decisions of those courts would appear to have been influenced by the English rules also, since the inter-relationship of our country with Scandinavia in all matters

affecting shipping has been very close for well over a century, and many contracts provide for the adjudication of disputes in London, even in cases where no British interest is involved. The result is a substantial degree of conformity between the two systems. Mr. Tiberg perhaps over-emphasises such differences as there are, a common tendency in a comparative study of this kind.

Mr. Tiberg not only sets out the relevant rules, and does so accurately and clearly, at any rate so far as the English rules are concerned, but discusses them against a background of awareness of the maritime business which has brought them into being. Moreover for a young lawyer his capacity for analysis is unusually good and he is not slow to point out what he considers to be weaknesses in the reasoning of the judges whose judgments he discusses, even when he is dealing with decisions in the House of Lords. Although his observations will not always compel concurrence they are often exceedingly pertinent and should be of value to English commercial lawyers when they are handling practical problems of demurrage.

C.

INTERNATIONAL LAW OPINIONS. Selected and annotated by Lord McNair. [London: Cambridge University Press. 1956. 3 volumes. £9 9s. net.]

IN a Memorandum for Encouraging the Progressive Development of International Law and its Eventual Codification (Doc.A/AC.10/7, 6 May 1947), the Secretariat of the United Nations suggested to the Committee on the Progressive Development of International Law and its Codification that the General Assembly might recommend to Governments the preparation of digests illustrating their point of view on matters of international law. In 1948 the Statute of the International Law Commission charged the Commission with the task of considering "ways and means of making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice . . ." (Art. 24).

The problem was further considered in another memorandum of the Secretariat relating to Ways and Means of Making the Evidence of Customary International Law More Readily Available (Doc. A/CN. 4/6, 1949). Here it was pointed out that "there is no official United Kingdom digest of international law comparable to the work of either Moore or Hackworth, though undoubtedly there exist materials from which it might be compiled, richer even than those which have been drawn upon in the United States, and including in particular some two hundred manuscript volumes of Opinions of the Law Officers in international legal questions." That this was not completely virgin soil, however, was indicated by reference to the use made of it by Professor H. A. Smith in his *Great Britain and the Law of Nations* and, in a more specialised fashion, by Lord McNair in his *Law of Treaties*. Other writers have also made some reference to British State practice, but in the future there will be no excuse for any writer to ignore some at least of the "two hundred manuscript volumes."

Lord McNair has placed all international lawyers and diplomatic historians in his debt by making available a fairly comprehensive selection of the Opinions of the Law Officers of the Crown, particularly for the period between 1782 and 1902. Two of his three volumes are devoted to the Law of Peace covering the personality of the State; kinds of States; the independence and immunities of States; recognition; succession; diplomatic agents; treaties—Lord McNair has retained this title only *pro forma*, for the relevant Opinions are contained in his *Law of Treaties*, of which a second edition is in course of preparation; high seas; State territory; territorial and national waters; individuals; jurisdiction; State responsibility; denial of justice; insurrection,

rebellion and civil war; blockades by and against insurgents and, in the same section, double payment of customs duties. These two volumes conclude with a section on measures of force not amounting to war, while volume three is concerned solely with the laws of war and neutrality.

In addition to the Opinions, Lord McNair has provided a list of the Law Officers and other advisers whose Opinions he has reproduced, the earliest being David Lewes, 1520?–1584, Admiralty Judge, William Aubrey, 1529–1595, Professor of Civil Law, Oxford, Valentine Dale, d. 1589, Fellow of All Souls College, Oxford, and William Drurie (Drury), d. 1589, Regius Professor of Civil Law, Cambridge, and the latest Alverstone, Carson and Finlay. Of the latter, Lord McNair writes that he has " formed the impression that Sir Robert Finlay had a much larger experience of the application of international law than most law officers. [He makes no similar comment on Scott, Lord Stowell, whom he describes as 'probably the greatest English civilian,' or about Phillimore or Travers Twiss.] It is also noteworthy how frequently he not merely stated the law but advised the Government *what to do*."

It may be regretted that Lord McNair does not disclose whether the Government did as Finlay had advised, nor is he any more forthcoming as to the action taken by the Government on the basis of any of the Opinions submitted to them. In this connection it is interesting to note the Opinion of July 29, 1862, submitted to Earl Russell and signed by Atherton and Roundell Palmer, later Lord Selborne, at the time of the *Alabama* incident: ". . . We have taken these papers [the Patent appointing Sir John Harding Her Majesty's Advocate-General] into our consideration and have the honour to report—That in our opinion the office held by Sir John Harding may be resigned by him, and such resignation being accepted by Her Majesty will be effectual." Harding resigned in 1862.

As a further Appendix, Lord McNair reproduces the text of his address before the Grotius Society delivered on July 18, 1953, on "The Debt of International Law in Britain to the Civil Law and the Civilians." In this lecture he referred to an instance as early as 1292 when Edward I consulted advisers, including William of Kylkenny, *juris civilis Professor*, to assist him in his arbitration among the thirteen claimants to the Scottish Crown. It was not until the sixteenth century, however, that the doctors of law assumed any organic form and Doctors' Commons dates from 1565, and reference to the doctors on matters of international law as a fairly regular practice dates from about the same time. Among their Opinions is that of Gentili, in association with Hotman of France, informing Elizabeth I that the Spanish Ambassador, Mendoza, could not be tried in England for conspiracy against the Queen, but would have to be sent back to his own sovereign for punishment. Modern practice regarding ambassadors is in accordance with this Opinion. So much is this so, that in the *Gubitchev* case, diplomatic status not having been recognised, the accused was nevertheless expelled from the United States and his prison sentence cancelled (*U.S.* v. *Coplon & Gubitchev*, 84 F.Supp. 472 (1949) and 88 F.Supp. 915 (1950)). In this lecture Lord McNair indicated the vast wealth of material that was to be found in the various Opinions of those, civilians and others, who served as law officers of the Crown. The material collected by him in these three volumes, however, is too profuse to permit of detailed comment. All that is feasible is reference to but two or three matters.

Since the Second World War there has been much written, and perhaps even more spoken, on the subject of human rights. Neither this subject nor that of humanitarian intervention figures in Lord McNair's Index. It is interesting to read, however, an Opinion of 1853, signed by Harding, Cockburn and Bethell. They had been asked, on behalf of Murray, H.M.'s Consul General in Egypt, " whether a British subject who has chosen to abjure his faith as a Christian and embrace that of Islam can, after residing many years as a professed Mussulman, return to his original creed and demand to be recognised again by Her Majesty's Consulate as a British subject." The law

officers were of opinion that "Mr. Murray should be instructed to recognise and protect as British subjects, all who can satisfactorily establish their legal claim to be such by birth, or naturalisation, whether they may have adhered to, or abjured Christianity, or Mahommedanism." Lord McNair does not state whether this Opinion was accepted, but it is perhaps of significance that the General Treaty between the United Kingdom and Morocco, 1856, provided, in Article 16, that "no British subject professing the Mahometan faith, or who may have professed the Mahometan religion, shall be considered as having in any manner lost, or as being by reason thereof in any degree less entitled to, the rights and privileges or the full protection, enjoyed by British subjects who are Christians. . . ."

Should human rights be generally recognised as legally protected and should the States of the world observe such rights, the institution of asylum would be unknown. It is a sad commentary on the belief of the General Assembly of the United Nations in the efficacy of their own Universal Declaration of Human Rights that they specifically provide in Article 14 that "everyone has the right to seek and enjoy in other countries asylum from persecution"—there is, of course, no concomitant duty on other countries to afford such asylum from persecution. In this connection, and in the light of the judgments of the International Court of Justice in the *Asylum* and *Haya de la Torre* cases (*I.C.J. Reports 1950*, p. 266, *1951*, p. 71), it is as well to draw attention to the opinion of Paul in 1733 that, although an alleged foreign murderer could not be removed by force from a British capital ship on which he had sought refuge, he should be surrendered to the local authorities. Asylum was a problem with which Sir William Scott was concerned almost a century later. He had been asked, in 1820, "whether any British subject coming on board His Majesty's ships of war in a foreign port, escaping from civil or criminal process in such port, and from the jurisdiction of the State within whose territory such port may be situated, is entitled to the protection of the British flag, and to be deemed as within the Kingdom of Great Britain and Ireland." To this Scott replied: "Upon this question, proposed *generally*, I feel no hesitation in declaring that I know of no such right of protection belonging to the British flag, and that I think such a pretension is unfounded in point of principle, is injurious to the rights of other countries, and is inconsistent with those of our own. The rights of territory are local and are fixed by known and determinate limits; ships are mere movables, and are treated as such in the general practice of nations. It is true that armed neutralities have attempted to give them a territorial character, but the attempt when made has always been most perseveringly and at all hazards resisted and defeated by the arms of our own country, as inconsistent with the rights of hostility and capture. No such character is allowed to protect ships of war when offending against the laws of neutrality upon the high seas, where no local authority whatever exists; still less can it be claimed where there is a visible and acknowledged authority belonging to an independent State in amity with the nation to which the ship of war belongs. Such a claim can lead to nothing but to the confusion and hostility which wait upon conflicting rights."

The problem of the territorial character of a public ship was considered by the Judicial Committee of the Privy Council in *Chung Chi Cheung* v. *The King* [1939] A.C. 160. The Opinions of the Law Officers of the Crown were not then readily available and the Board weighed the opinion of Oppenheim against that of Brierly, rejecting the former's view that a public ship could be regarded "as a floating portion of the flag-State." The publication of Scott's Opinion to the contrary effect indicates the caution with which the views of writers should be considered as indicative of the rules of international law, when compared with the significance of State practice. Oppenheim, writing *ex cathedra*, expressed a view directly contrary to that regarded by Scott as being "the general practice of nations" almost a century earlier.

Another topic on which the Opinions collected by Lord McNair are of

topical interest is that relating to "Measures of Force not amounting to War," which appear as the last section of the Law of Peace at the end of Volume 2. As is well known, the British Government did not regard the 1956 operations against Egypt as constituting a war, but only a "state of armed conflict." At the end of October, 1956, the Admiralty issued a statement advising all merchant shipping to keep clear of Egyptian and Israeli waters. The Soviet Union protested against this closure, but without effect. This British action was in line with that adopted by General Mark Clark as Commander of the United Nations Forces in Korea. He issued an order establishing a sea defence area around the Korean peninsula and within twelve miles of the Russian coast. The zone was placed under the direction of the Commander-in-Chief of the United States Naval Forces in the Far East who was authorised to search any ship entering the blockade area regardless of nationality. This was very different from the draft despatch prepared by Russell and Rigby in connection with the proposed French blockade of Siam at the end of 1893: "If the blockading Power claims to interfere with the ships of third nations the measure may properly be regarded by such third nations as an act of belligerency implying the existence of a state of war. . . . It would have been impossible for [Her Majesty's Government] to have recognised it as valid against British shipping except as a belligerent measure implying a state of war."

As was pointed out above, Lord McNair's fascinating collection of documents has been gleaned primarily from the 120 years between 1782 and 1902. In addition to the vast quantity of material antedating his period, he indicates that there is much of value in the quantity of Minutes and Memoranda prepared by the legal staff of the Foreign Office, particularly during the last eighty years. He is also of opinion that much is to be learned from the Reports made by the Scottish and Irish law officers. Now that Lord McNair has shown that these materials can be edited in a useful fashion, it is to be hoped that other writers in the field of international law will pay more attention to them and that, at some time, it will be possible to indicate to what extent it is safe to describe them, as he does, as "a 'material source' of the law in Salmond's sense of that term." Lord McNair does "not claim these opinions are the law. No State alone can make law. But it is valuable to know what any State's legal advisers believe to be the law, because in the majority of cases it is that advice which governs the practice of the State." When the additional research, to the need of which reference has been made, is completed it may be possible to determine how large this "majority" is and to ascertain the extent to which the advice given at one time "quite objectively and without regard to any other factor than stating to the Government their general opinion" is regarded by the British Government as being truly expressive of international law as understood by the United Kingdom.

L. C. Green.

Transnational Law. By Philip C. Jessup. [Yale University Press. London: Oxford University Press. 1956. 113 pp. 24s. net.]

This stimulating little book reproduces the Storrs Lectures which its distinguished author delivered at the Yale Law School in February, 1956. It contains many interesting suggestions or hints, but it is not altogether easy to read or review it, because the precise implications of the author's thoughts are sometimes left a little vague and await elaboration.

Professor Jessup considers as transnational all law that involves a foreign element, so that it "includes both civil and criminal aspects, it includes what we know as public and private international law and it includes national law, both public and private" (p. 106). From all these bodies of law a tribunal, whether national or international, should be authorised to choose "the

rule considered to be most in conformity with reason and justice for the solution of any particular controversy" (*ibid.*). And it "would be the function of transnational law to reshuffle the cases and to deal out jurisdiction in the manner most conducive to the needs and convenience of all members of the international community" (p. 71).

It is very likely that Professor Jessup's tendencies will meet with the approval of many "transnational lawyers," that the interconnection between the various branches of "transnational law" is in fact greater than most lawyers are at present inclined to recognise and that some of our traditional distinctions are arbitrary and fortuitous. But as the author himself seems to admit, "if there be any virtue in developing transnational law, much more exploration and analysis" (p. 113) will be required. This is a task which, of course, far exceeds the scope of Professor Jessup's lectures. It is to be hoped that he will soon revert to the problem in a comprehensive fashion and thus contribute to its practical solution.

F. A. Mann.

American Constitutional Law. By Bernard Schwartz, Professor of Law and Director of the Institute of Comparative Law, New York University. [Cambridge University Press. 1955. 364 pp. 25s. net.]

There are two methods of writing a book about an enacted constitution. The first, which seems the obvious one, is to use the text of the constitution as the framework, commenting on each section by explaining difficulties of interpretation with reference to judicial decisions and political experience, as in Professor Corwin's *The Constitution and What it Means Today*. The other is to write a connected exposition of principles (as we perforce must with our constitution), as if the constitution were not a written one. The latter method, as Professor Schwartz shows, is not only possible but actually just as valuable to the student of American constitutional law. Since Bryce's day, others in this country, notably Amos, Laski and Brogan, have helped our understanding of the American system of government, but for a balanced, up-to-date account from the legal viewpoint Professor Schwartz's book has—and for some time need fear—no rival. The learned author draws upon his own knowledge and experience of British constitutional law for illuminating comparisons between the two systems, without going out of his way to disparage either.

The first part of the book describes structure—the Federal system, Congress, the President and the Courts. It is true, as Professor Schwartz says, that the constitutional lawyer is concerned primarily with legal rules rather than constitutional conventions, but we are surprised that "convention" does not even appear in the index, and we regret that the learned author—who necessarily mentions usages or conventions in discussing such topics as Presidential elections and the President's Cabinet—nowhere brings together his views on the place of convention, custom or usage in the working of the American constitution.

If the first part of the book will naturally be of chief value to the student who is not already well acquainted with American constitutional law, the second part will interest and instruct every kind of reader. Here Professor Schwartz considers modern developments, especially in the light of recent Supreme Court decisions. In the "new Federalism" he discerns, from the New Deal onwards, a tendency towards centralisation. Other chapters are built round the Presidential prerogative and the *Steel Seizure Case*; the changing rôle of the Supreme Court, which since 1937 has exercised restraint in controlling Acts of Congress, while as arbiter of the Federal system increasing its supervision over State legislatures and executive officers; the

Negro problem; the extent and protection of civil liberties during a period of "Cold War"; and the modern position of the United States as a member of international organisations. As we should expect from one who has already published scholarly works on American, English and French administrative law, his Chapter 11 on American administrative law—though short—is a masterly review which shows the origin, purpose and limitations of the Administrative Procedure Act, 1946.

Finally, the book is attractively produced, its size by no means intimidating, and the price reasonable.

O. Hood Phillips.

The "Higher Law" Background of American Constitutional Law. By Edward S. Corwin. [Cornell University Press. 1955. 89 pp. 7s. 6d. net.]

A new generation will welcome a reprint of Professor Corwin's two articles which first appeared nearly thirty years ago in Volume 42 of the *Harvard Law Review*. This learned essay, surveying the growth of the idea that there are certain legal principles superior to positive law, retells with grace and clarity the story of natural law in ancient Greece and Rome and medieval Europe, illustrated by many first-hand references to the texts. Fresh insight is given into what Coke did and did not say in *Bonham's Case* and elsewhere about the power of the courts to control Acts of Parliament.

Lecturers on Jurisprudence wishing to demonstrate that natural law ideas have not been mere academic theorising unrelated to the growth of institutions, will find much useful material in the latter part of Professor Corwin's essay, which shows how these "higher law" ideas were transported across the Atlantic to influence the birth and interpretation of the American Constitution as the supreme law of the land.

O. Hood Phillips.

The Supreme Court in the American System of Government. By Robert H. Jackson. [Harvard University Press. 1955. viii and 92 pp. $2.00.]

This posthumous volume prints the three 1955 Godkin Lectures, prepared but not delivered by Mr. Justice Jackson before his death in 1954. Mr. Jackson was better known outside the United States than most other twentieth century Justices of the Supreme Court because he acted as Chief of the United States Counsel at the Nürnberg trials of 1945–1946. He had, previous to being appointed an Associate Justice of the Supreme Court by President F. D. Roosevelt in 1941, served both as Solicitor General and Attorney General of the United States. He was, nevertheless, a lawyer first and foremost and a politician only to a very muted extent; he never held elected public office or fought a campaign to secure such; he was a Democrat but not very different in his views from many moderate-minded Republicans. He probably abhorred McCarthy, MacArthur and McCormick, but also probably disapproved discreetly of Harry Truman, Harold Ickes and Harry Hopkins as well. He was a competent lawyer and judge, but no world-shaker or world-beater, as these final essays more than demonstrate. Nobody will ever publish his "dissenting opinions" (if he had any that were worthy of note) as a separate volume, nor collect his every letter and his *obiter dicta*, as has been done for Oliver Wendell Holmes, Jr. He has no prominent disciples and the late Professor Harold Laski is not known to have troubled to invent any stories about him or to have claimed to call him "Bob" to his face.

Associate Justice Jackson appears from his writings and his career to have been dull and slightly stuffy (but the reviewer did not have the advantage of knowing him personally in order to be able perhaps to correct this second-hand impression) and the three essays here printed cover somewhat familiar ground. The first, on "The Supreme Court as a Unit of Government," compares and contrasts it usefully with similar courts abroad, and discusses the problems created by its congestion of business; the second essay, on "The Supreme Court as a Law Court," discusses mainly the relations of the court with the separate States of the Union and its functions of reviewing administrative decisions, both State and Federal; the third essay, on "The Supreme Court as a Political Institution," attempts to answer the accusation that the court makes political decisions and to demonstrate its role as holding the balance between executive and the legislative branches, between Federal power and State power, between State and State and between the majority and the individual. Useful examples are given and interesting cases are cited but nothing very original is said. British readers will be specially interested in the Justice's view (pp. 81–82) that:

> "I have been repeatedly impressed with the speed and certainty with which the slightest invasion of British individual freedom or minority rights by officials of the Government is picked up in Parliament, not merely by the opposition but by the party in power, and made the subject of persistent questioning, criticism, and sometimes rebuke. There is no waiting on the theory that the judges will take care of it. In this country, on the other hand, we rarely have a political issue made of any kind of invasion of civil liberty . . . any court which undertakes by its legal processes to enforce civil liberties needs the support of an enlightened and vigorous public opinion which will be intelligent and discriminating as to what cases are really civil liberty cases and what questions really are involved in those cases. I do not think the American public is enlightened on this subject."

Coming from a Justice of the Supreme Court of the United States, this opinion must command respect, even if one does not entirely agree with it and wonders after reading it whether those splendid marble halls of the Supreme Court building in Washington, D.C., do not incorporate in some corner of their design at least one ivory tower.

John A. Hawgood.

Legislative, Executive and Judicial Powers in Australia. Second edition. By W. Anstey Wynes, ll.d. [Australia: Law Book Co. of Australasia Pty. Ltd. 1956. lxiv and 768 pp. £4 15s. net.]

Cases on the Constitution of the Commonwealth of Australia. Second edition. By Geoffrey Sawer, Professor of Law in the Australian National University. [Australia: Law Book Co. of Australasia Pty. Ltd. 1957. xxxi and 629 pp. £3 10s. net.]

The first edition of Dr. Wynes' book was published in 1936 under the name of *Legislative and Executive Powers in Australia*. A new edition was long overdue, for there had been many important developments in Australian constitutional law, especially in the field of judicial interpretation, and no effective challenger to *Wynes* had entered the lists. Fortunately Dr. Wynes took the opportunity to revise the text thoroughly and to add chapters on the judicial power. He had time to incorporate the High Court's decision in the *Boilermakers'* case, which was affirmed by the Privy Council this year. The book is, therefore, almost a complete account of the law of the Australian Constitution.

Australian constitutional law is tough law; and this is a tough book, in which the author makes few concessions to the casual reader. Dr. Wynes is concerned predominantly with the law expounded by the courts, and his approach, like that of the present High Court, is conservative and traditional. To him the only appropriate method of interpreting the Constitution is the method of analytical logic, for this alone supplies a measure of judicial objectivity. He rejects the compact theory of federalism, and equally the various historical, progressive and sociological theories of interpretation that have been canvassed by other writers. At the beginning of the book he quotes, beneath two clauses of Magna Carta, a typical observation by the distinguished Chief Justice of Australia, Sir Owen Dixon:

> ". . . close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts. It may be that the [High Court] is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism . . ."

Judge and author have followed this precept. In the last few years the High Court and, after the High Court, the Judicial Committee of the Privy Council, have refashioned the interpretation of section 92 of the Constitution (which guarantees the absolute freedom of inter-State trade and commerce) by a series of decisions which are indeed impressive as an exercise in juristic logic but which pay little regard to "the felt needs of the times." Dr. Wynes entirely approves of the present trend of interpretation, and his analysis of the cases on section 92 is masterly. But the limitations of "a strict and complete legalism" are clearly exposed in the history of the interpretation of the Commonwealth defence power. When it is contended that a law not intrinsically *about* the military or naval defence of the Commonwealth is nevertheless a law *with respect to* the defence of the Commonwealth, the court that is called upon to determine its validity is faced with a difficult and possibly embarrassing task. The court must consider, first, what matters are comprised within the concept of the defence of the Commonwealth; secondly, what degree of connection between the operation of an impugned law and the defence of the Commonwealth is requisite to sustain the validity of the law, and thirdly, whether that degree of connection exists in the particular case. It is unrealistic to insist that in answering these questions judges do in fact insulate their judicial minds from their basic individual conceptions of the public welfare or from their assessments of the merits of the measure before them, though it is reasonable to assert that the courts ought to formulate more or less objective criteria that will as far as possible reduce the area of free judicial discretion. It is difficult to read the enormously prolix judgments in the case in which the High Court held invalid the Communist Party Dissolution Act without receiving the impression that the judges in the majority thought the Act to be an excessive restriction of civil liberty in peacetime and were resolutely determined to conceal their value-judgments behind a massive edifice of analytical logic. This was not, apparently, the impression received by Dr. Wynes, who rigorously shuns anything savouring of extra-legal speculation and readily takes the words of the judges as he finds them. To the reviewer, the author's exaltation of judicial logic and his over-ready dismissal of the relevance of other factors in constitutional interpretation is the one serious flaw in an outstanding treatise.

Professor Sawer's casebook now incorporates references to Dr. Wynes' textbook for further reading. Students of Australian constitutional law can now equip themselves (at a rather stiff price) with two works of a very high quality. The casebook includes nearly all the most important of the recent leading decisions on the defence power and section 92, and also the Privy Council decision in the *Boilermakers'* case. Professor Sawer's editorial notes are terse, but he writes enough to bear out his prefatory comment that he differs from Dr. Wynes' general approach, which he considers excessively formal. He

is himself a perceptive and stimulating author of articles on the law and practice of the Australian Constitution. Is it too much to hope for a treatise on Australian constitutional law from him? There is obviously room for another work on the subject written from a different standpoint from that taken by Dr. Wynes; and no one is better equipped than Professor Sawer to write it.

S. A. de Smith.

Constitutional Problems in Pakistan. By Sir Ivor Jennings. [Cambridge University Press. 1957. xvi and 370 and (index) 8 pp. 42s. net.]

The period covered by this book, with its rather euphemistic title, is largely that of 1954–1955, when Pakistan was engaged by constitutional troubles of the gravest kind. The Constituent Assembly, set up as a result of the provisions of the Indian Independence Act, 1947, with the main function of preparing a Constitution for Pakistan, had failed to carry out that duty within seven years. But on the defeat of the Muslim League in the elections for the East Bengal Legislative Assembly in April, 1954, the process was rapidly accelerated, and a Draft Constitution would have been ready for signature on October 25, had not the Governor-General, who considered it unsatisfactory and controversial, dissolved the Assembly the day before. The result was to set off a chain of litigation in both Federal and other courts concerned with the constitutional position and problems now involved. In the course of these cases the courts considered in full many of the basic concepts concerned with democratic government and the status of an independent member of the Commonwealth. In perhaps the most important of the cases, *Federation of Pakistan* v. *Moulvi Tamizuddin Khan*, the prerogative powers of the Crown in relation to assent to litigation were closely examined, and the result of the decision was to render 44 Acts of the Assembly invalid because they had not received the assent of the Governor-General. The Governor-General therefore issued a proclamation of emergency and an Emergency Powers Ordinance, under the Government of India Act, 1935, purporting, *inter alia*, to validate 35 of the 44 Acts. The Federal Court, in *Usif Patel* v. *The Crown*, promptly held that he had no power under that Act retrospectively to validate constitutional legislation. The Governor-General then made a Special Reference to the Federal Court of certain questions relating to his powers of dealing with the emergency, thus giving the Court the opportunity of examining the prerogative powers to summon, prorogue and dissolve legislative and constituent bodies, and the relations between statutory and prerogative powers, and to apply the common law doctrine of necessity and the maxim *salus populi suprema lex* for the first time to the type of conditions of emergency created by the decision in *Tamizuddin Khan's* case. Eventually, in accordance with the opinion in the *Special Reference*, a new Constituent Assembly met in July, 1955, and a Validation of Laws Bill received the Governor-General's assent in October of that year, thus ending the crisis. Since then, as is generally known, the new Constitution of the Islamic Republic of Pakistan has come into being.

The writings of Sir Ivor Jennings have long been well known to students of constitutional law. He is now Master of Trinity Hall, Cambridge, but during the last few years he has spent much time in Ceylon and Pakistan, and the present volume is a product of his former post as Constitutional Adviser to the Government of Pakistan. On this occasion he appears more as a maestro than an author, for he introduces to English readers the verbatim judgments of the members of the Pakistan Federal Court. A great debt must be owed to Sir Ivor for this service, for the passages he has made so readily accessible are of very high quality. Nor can the problems raised and discussed during these few months be consigned to the realm of legal history. The cases have an

important bearing on the constitutional laws of the common law world and repay careful study. The bulk of the book contains the judgments in the three cases before the Federal Court and the Report on the Special Reference to the Court by the Governor-General. In particular the 82-page judgment of Muhammad Munir C.J. in *Tamizuddin Khan's* case ought to be read by all serious students of constitutional law, for it covers many vital problems in a manner which is clear, concise, stimulating, and both practical and jurisprudential. It bears the mark of a powerful mind directed upon a field not previously considered by him, and it doubtless reflects great credit upon the arguments of counsel before him. This is a case-book, but of a rather special kind, for it contains only four cases or references, taken from the official copies furnished by the Pakistan Ministry of Law. Sir Ivor's own written contribution is a 75-page introduction, in which he discusses the historical and legal background of the saga and digests the more important of the cases which were not argued before the Federal Court. He also provides tables of cases and enactments (a guarded description in the circumstances!) and an admirable index. It is a work of great value and absorbing interest.

D. C. M. Yardley.

A Constitution for Pakistan. By Herbert Feldman. [Oxford University Press. 1955. 103 pp. Rs. 3/8.]

The purpose of this booklet (accurately printed in Karachi) is to explain the circumstances that impeded the preparation of a constitution for Pakistan. Mr. Jinnah thought the process would take less than two years: eventually it took more than eight. For that the death of Mr. Jinnah was itself partly responsible. Other reasons will be found in Mr. Feldman's concise and knowledgeable account of the political, geographical, religious, economic and linguistic background. He provides a useful bridge between the provisional constitution based on the Government of India Act, 1935, described in Mr. C. M. Shafqat's earlier essay, *Pakistan Constitution*, and Sir Ivor Jennings's more recent and weightier *Constitutional Problems in Pakistan*.

Making use of committee reports, Constituent Assembly debates, local newspapers, law reports and personal knowledge of the country, the author guides us through the more notable events in what must have seemed to many the depressing infancy of the new State. From the Objectives Resolution and the Report of the Basic Principles Committee, we pass to the Governor-General's dismissal of the Constituent Assembly. Brief accounts are then given of *Tamizuddin Khan's* case questioning the validity of that dismissal, *Usif Patel's* case questioning the purported validation by the Governor-General of laws passed by the Constituent Assembly without receiving his assent, and the *Special Reference, 1955*, in which the Governor-General asked the Federal Court for an opinion on the legality of his conduct of affairs in an unprecedented constitutional emergency. These cases will now be found fully reported in Sir Ivor Jennings's book. We do not reach the introduction of the draft constitution, Mr. Feldman's account taking us as far as the consolidation of West Pakistan.

The author's own occasional comments appear to be sound. He enlightens us on the differences between various Muslim sects, and points out that it was not Mr. Jinnah's intention that Pakistan should be an Islamic State. He gives warning of the danger of inefficient administration, questions the desirability of former officials entering politics, emphasises the tension between East and West Pakistan, and considers that on the whole the Governors-General have served the State better than the Prime Ministers. The paradox of granting the franchise before providing education is surely not peculiar to Pakistan: among the new or inchoate members of the Commonwealth the same paradox will be found in other parts of Asia and in Africa.

O. Hood Phillips.

THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE, 1552–1634. By CATHERINE DRINKER BOWEN. [London: Hamish Hamilton, Ltd. 1957. xiv and 517 and (index) 14 pp. 42s. net.]

IN the minds of all common lawyers the name of Sir Edward Coke is firmly fixed as that of one of the greatest figures of English legal history, and therefore a detailed biography is particularly welcome. Apart from a few brief "Lives" only three such biographies (those of Serjeant Woolrych (1826), C. W. Johnson (1837) and Lyon and Block (1929)) have previously been written, and this is perhaps the best, though Mrs. Bowen makes no claim to discovery of new material (see p. 480). The work is easy to read, the text being written as a continuous narrative unbroken save for very rare explanatory footnotes. Chapter notes, a full account of sources and method, and a list of source references appear at the end of the whole text, which is probably not an unreasonable procedure in a work of this kind. The style is fluent, and the pictures of the times which Mrs. Bowen has painted are vivid and exciting. This is a meeting-place for legal and historical scholarship, and the authoress has worked carefully through Coke's writings, and fitted them into the legal, religious, political and social background of the day.

The outline of Coke's career is well known. We see how the respectable Norfolk gentleman passed through Trinity College, Cambridge (where he was later to be High Steward), Clifford's Inn and the Inner Temple, and how he served as counsel in the famous *Shelley's Case* (p. 63). Successively Recorder of Coventry and Norwich, Justice of the Peace for Aldeburgh, Bencher of the Inner Temple, Recorder of London, Reader of the Inner Temple, Solicitor-General and Speaker of the House of Commons, he became in 1594 Attorney-General despite the intrigues of his rival Bacon. A young Gray's Inn man had said at the time that "*the Bacon* may be too hard for *the Cook*" (p. 68), but this was not to be proved true. Thus began twelve years in which Coke exercised his duties ruthlessly. The years were fraught with troubles over the succession and over religion, with Catholic plots and Protestant counter-plots. Mrs. Bowen's accounts of some of the trials (*e.g.*, those of Essex, Raleigh and the gunpowder plotters) are fascinating, though sometimes too much like modern journalism, as, for example, in the trial of Essex: "Coke's voice droned on. Occasionally he consulted his papers, holding them in the dim light close to his face. . . ." (p. 126). But for the legal historian the account of Coke's work as Attorney-General in Star Chamber (Chap. 9) is probably of most interest. Some of the punishments inflicted by that court were bizarre. A man who beat his grandfather was sentenced to be whipped "before the old man's portrait" (p. 97). And two ruffians who broke into a lodging and gagged and cruelly beat a woman and her maid were flogged before the house, "gagged with the same gags, each with his own gag, that they had used to the said Mrs. Whitingham and her maid" (p. 97). Maybe we can still learn from Star Chamber practice! Later on, in 1616, James I exercised his right to sit in Star Chamber, though no sovereign had done so since Henry VIII. The absolutist Scot, out of touch with English feelings, had thus done much, it was afterwards agreed, towards the eventual disappearance of that court (p. 323).

In 1606, aged 54, Coke became first Serjeant, then Chief Justice of the Common Pleas, and immediately began his long struggle on behalf of the common law against prerogative and the prerogative courts. Mrs. Bowen quotes Francis Bacon's biographer as saying: "The most offensive of Attorney-Generals transformed into the most admired and venerated of judges" (p. 251). This sudden change is not so very strange when it is realised that Coke was above all the most energetic and thorough workman in whatever operation he might happen to be engaged. When the King (or Queen) was his master he threw his whole heart and soul into serving him, and when he entered the service of the common law he did his duty to his new lord. He rose at 3 a.m. each

morning (going to bed at 9 p.m.), and it was his prodigious labours, with no half-measures, in high and vital matters, coupled with his voluminous writings, which earned him his greatness. He now had mighty opponents—James I, who attempted to place himself above the law, backed by Lord Chancellor Ellesmere, Archbishop Bancroft and Bacon—but he used the writ of prohibition fearlessly against prerogative courts. The struggle was long, bitter and inconclusive and, at Bacon's instigation, Coke was banished in 1613 to the Chief Justiceship of the King's Bench, "not only weeping himself but followed with the teares of all that bench (Common Pleas) and most of the officers of that court" (p. 294). Nevertheless there was yet to come his abortive struggle with Chancery (Chap. 27), in which he overstepped the mark with his bluntness and lack of tact. Then, soon after the Overbury trials (pp. 314–318), he was suspended from the Privy Council and dismissed from office. As Chamberlain (a London bachelor of the time, whose well-informed and impartial letters have been used extensively by the author) remarked: "Four Ps have overthrown and put him down, that is Pride, Prohibitions, Premunire and Prerogative" (p. 334).

After a period of semi-retirement, punctuated by battles with his second wife (Lady Hatton, who had kept her former surname on her marriage to Coke) over property and the marriage of their daughter, he was restored to the Privy Council, and later re-entered the Commons in time for the impeachment in 1621 of Bacon, who confessed to the twenty-eight charges against him and left public life. Thus was finally resolved the struggle between these two men, a rivalry which even entered their private lives, for Bacon had been an unsuccessful suitor for the hand of Lady Hatton. By 1620 Coke had allied himself with the Parliamentary opposition and he became a leading figure in the growing struggle between King and Parliament, despite seven months spent in the Tower. There are signs of this tension in the early part of the book, but the wise Elizabeth knew how to control incipient unrest. James I and Charles I did not, and despite his banishment from the Commons during 1626, when Charles pricked him as High Sheriff of Buckinghamshire, Coke's public life ends with the Petition of Right in 1628, of which he was the prime instigator (Chap. 33). His last recorded speech on the liberty of the subject was delivered (p. 433) shortly before the King approved the Petition.

King Charles ordered his house to be searched on September 1, 1634, as Coke lay dying, and the manuscripts of all four parts of the *Institutes* (only the first having been published) and manuscript notes for two additional books of *Reports* were taken away (p. 460). How fortunate it is that they yet survived. The book is richly sprinkled with quotations and extracts from his writings, the most important of which are listed on pp. 482–483, where it is pleasant to be reminded of *The Reports of Sir Edward Coke, Kt., in Verse*, edited by John Worrall, 1742. We are reminded that many of the resolutions in the *Reports* are probably extrajudicial. In addition Mrs. Bowen suggests (p. 479) that some enterprising publisher should print the prefaces of each of the first eleven parts of the *Reports* in one volume.

It is to be expected that this biography deals more with Coke's efforts in the field of criminal and constitutional law than with private law and the form of law, but it is odd that there is no mention of his attack on the Court of Admiralty soon after he became Chief Justice of the Common Pleas. But otherwise there are very few minor errors or misprints, though the reader may be surprised at the suggestion on p. 245 that the Assize Judge is heralded with trumpets today only in Cambridge!

D. C. M. Yardley.

THE LAW IN ACTION, (A Series of Broadcast Talks) Vol. 2, with a Foreword by Sir Alfred Denning. [London: Stevens & Sons, Ltd. 1957. 134 pp. 10s. net.]

THIS small book contains the revised texts of ten broadcasts made by teachers of law during the period 1954–1955. It is difficult to judge the impact of the talks from the texts, though one has heard several of these talks and appreciated the style of delivery of the speakers. It does seem that the style of writing is highly adapted to the task of making law clear and interesting. Whether or not the layman has enjoyed these talks, they make easy and useful reading for the lawyer, and it might be asked why all legal articles do not attempt something of the kind. The choice of subject-matter is not always so transparently successful, but such a choice is unenviable, for not every field of law will interest the layman, and topicality is a fickle jade. All in all the talks seem better than one would have a right to expect. A brief word may be added about each. Dr. Jackson's article falls into rather distinct parts but it does concern parts of an important whole, and of great popular interest—the drunken driver. Professor Hargreaves relieves a rather technical problem, conditions in wills, by emphasising the liberal ideals which govern its modern treatment. Mr. Dew deals with very general interest in his up-to-date account of the breakdown of marriages from marital hostility. Two eminent practitioners who also teach and write law then deal with current cases. Mr. Gerald Gardiner, Q.C., explains the changes in the treatment of exemption clauses as due to recognition of the fictitious nature of freedom of contract and Mr. Brunyate deftly summarises the apparently formidable subject of revision of settlements to avoid death duties. Professor Goodhart gives a historical and analytical account of the tort of maintenance; he hints at the reasons for its obsolescence, though he might have given more details about costs and vexatious litigants. Mr. R. E. Megarry, Q.C., picked a rather esoteric case on equitable profits, but made it rather interesting with his usual amusing gift of narrative. He might well have explained how a £100 dispute found itself in the Lords. Mr. H. W. R. Wade's talk on the privilege of discovery of the Crown had the advantage of topicality plus constitutional theory and he maintained a strong dramatic unity, giving much detail but keeping on top of it. Dr. Morris and Professor Gower had the advantage of using the comparative treatment, which makes law three-dimensional and must have increased the interest of the intelligent layman. Dr. Morris's murder without a body was also inherently dramatic and of popular interest. Professor Gower's talk on take-over bids performs a great service for the non-specialist lawyer, who is often mystified by the exact line to be drawn between such bids and other transactions, though the amount of detail may be excessive. It is only fair to add that much of the detail was added in footnotes and not delivered as part of the address, and the very addition of this material will make this section of the book of more lasting interest to legal readers.

The legal profession should be grateful to the eminent spokesmen it has found to represent it in the forum of public interest. The public may not be wooed by the state of the law which these talks reveal but they cannot fail to be impressed by the calibre of the men giving the talks, and the standard of knowledge and judgment they have acquired.

A. K. R. KIRALFY.

GIRLS WHO GO WRONG. By KATHARINE SULLIVAN. [London: Victor Gollancz Ltd. 1956. x and 243 pp. 16s. net.]

MISS SULLIVAN in this book gives a personal account of the work she has done among female offenders during the past ten years as a member of the Parole Board for the State of Massachusetts.

At the risk of explaining the obvious it should be said that "parole" must be clearly distinguished both from probation and from partial remission of a sentence (for good conduct) as practised in this country. "Parole" has sometimes been described as the nearest approach yet devised and widely accepted towards the indeterminate sentence. Perhaps a more revealing way of putting it would be to say that it shifts the burden of deciding upon the date of any release from imprisonment away both from the courts and from the Prison Authorities and entrusts it to a third, more or less independent, authority, the Parole Boards. Under Massachusetts law, for instance, the judge will determine a maximum sentence of imprisonment and, allowing for maximum remission earned, the sentence of the court cannot expire until at least two-thirds of it has been served. But, unless a minimum has been indicated by the judge, the question whether the whole of this period is in fact to be served in confinement or not is a matter to be decided in each individual case, upon careful assessment of all the personal factors and prospects (sometimes called "parole prediction"), at the discretion of the Parole Board.

Parole thus is "an administrative expedient" which allows for gradual re-integration of an offender into society under strict supervision. In this sense the nearest approach is our "after-care" system, but it must be understood that the Board may grant parole many years before the expiry of sentence; it can, moreover, make any rules, stipulations and impose any safeguards it deems necessary in each case and has practically unlimited powers to revoke parole, with the result that it may, at any time during the currency of the sentence and without intervention of any court of law, commit offenders back to the prison or other institution from which it has released them. Just how different the American conception of parole is from anything yet practised in this country is perhaps shown by the fact that certain States go even further than Massachusetts, so that in California for instance the courts now actually decide only upon the guilt of the offenders, while the Parole Authority sets the sentence and final discharge.

Not that Miss Sullivan, in her *Girls Who Go Wrong*, enters into the pros and cons or the technical details of the parole system. She has helped to work it and, despite inevitable failures and constant disappointments, she believes in it whole-heartedly. The purpose of her book, which is written for an American audience, is primarily an attempt to convey to the general reader something of the difficulties with which the problem of rehabilitation is beset and to invoke their co-operation, the co-operation of the community which is so vital to its success.

Success is never easy and never quite certain. But whether or not one shares the fundamental optimism with which Miss Sullivan, none the less, approaches her account of the work of her Parole Board, the warm-hearted and humane spirit with which she puts forward the case histories of some of the offenders who have come before her carries the conviction that parole has a promising contribution to make. The system is an expensive one both in money and manpower, but well worthwhile from many points of view. Not least, it should be stressed, from the financial one, when it is seen that, as the author says, "the expense of keeping each girl in the reformatory is $2,564 a year compared to $93 a year to keep her on parole."

H. A. Hammelmann.

The Queen's Courts. By Peter Archer. [Penguin Books, Ltd. 1956. ix and 289 pp. (with index). 3s. 6d. net.]

This is a useful addition to the small number of "pelicans" already published on law and government. It is written in a lucid and attractive, almost breezy, style and can be confidently recommended to the young student who wishes to

get a bird's-eye view of our judicial administration before commencing his detailed studies, and also to the inquiring layman, though with reservations.

It opens with two admirable introductory chapters which explain to the layman what the law is about and what the social material is which necessitates a system of courts. Then in some nineteen chapters it describes the actual court system which exists in England. It contains three chapters on the court system in three important countries which have arrangements very different from our own, the U.S.A., France, and the U.S.S.R. And it contains four chapters on how the courts work.

My main criticism of the book is that it devotes much too much space to history at the expense of the description of the actual court system in operation today. Thus out of about seventy-five pages given to the superior courts, civil and criminal, in section two, thirty are taken up with history. I agree of course that it is virtually impossible to understand anything in connection with the English court system without some history, but I feel that so much time is commonly spent examining what is under the ground that the tree which bears the fruit on which we now have to live is too much taken for granted. Is it really necessary for example to discuss the Bill of Middlesex, or the struggle between Bacon and Coke? Yet such really important historical facts as Bentham's sponsoring of the modern county court system are not mentioned.

A similar antiquarianism is evident in the section on local justice where, in addition to plenty of history in connection with the courts of the justices of the peace, over twenty per cent. of the total space available is devoted to local survivals such as the Palatine Court of Lancashire, the Mayor's Court of the City of London, etc.

There are quite a number of errors on points of detail and still more cases of categorical statements which require some qualification. The Lord Chancellor is not Speaker of the House of Lords in the proper sense of the term (p. 5); a usage or custom when once established by decision of a court becomes a legal rule and cannot be "reformulated" in accordance with the habits of the day (p. 14); the local advisory committee which advises the Lord Chancellor on magisterial appointments is in fact the Lord Lieutenants' committee (p. 107); there is no rigid rule that only barristers have a right of audience at Quarter Sessions—the court can, and sometimes does, grant the right to solicitors (p. 120). Several other instances of similar inaccuracy have been noticed but the above will suffice to show that revision is necessary.

I doubt whether the author was well advised to add four chapters (section four) on practice and procedure. The space available being so very short I think he would have been well advised to expand what he had to say on the court system itself instead of attempting to describe the procedure of both criminal and civil courts, an attempt which could hardly be adequate, especially as here again he was determined to be historical. Similar considerations apply to the even shorter chapters on foreign systems, the attempt to describe the court system of the U.S.A. in seven pages was bound to be unsatisfactory. The importance of the Procurator's Office in the U.S.S.R. is mentioned, but again the description of its complex and wide-reaching functions given in a couple of pages is quite inadequate.

C.

THE ENGLISH LEGAL SYSTEM. Second edition. By A. K. R. KIRALFY, PH.D., LL.M., of Gray's Inn, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1956. xxv and 404 pp. including index. 30s. net.]

THE popularity of this introductory book with students has made a new edition necessary within a comparatively short period of time. The new version incorporates certain changes brought about by the County Court Act, 1955, the Army Act, 1955, and the Air Force Act, 1955, as well as the changes in

procedure on appeal and those envisaged by the Administration of Justice Bill. Some account is taken of criticisms made when the original edition was published (reviewed also in Vol. 18 M.L.R. 84) but the general nature and character of the book have not changed. An attempt at improvement was made mainly with regard to certain obscure points which are now rendered more explicitly but, on the whole, the weaknesses of the original text have remained intact. Perhaps the time for a more thorough revision has not come yet. Even in matters of detail the change is not invariably a happy one. It is no improvement, for instance, to state that the distinction between *R.* v. *Wheat & Stocks* and *R.* v. *Tolson* (p. 129) is that between mistake of law and mistake of fact and it should be made clear that this was not the way in which the court distinguished these two cases.

Nevertheless, in spite of these defects, the book is learned and scholarly in a difficult field. It will certainly maintain its high reputation as a valuable introduction to the English legal system. The learned author has managed to bring in some welcome newcomers such as the *Bonsor* case, *Moynes* v. *Coopper and others*, although the new version is shorter than the original by a few pages. It is a sad comment on present costs of producing even popular law books that it was found necessary to increase the price of this new edition by two shillings and sixpence.

A. G. Chloros.

The General Principles of English Law. By W. F. Frank. [London: George G. Harrap & Co. 1957. 177 pp. 10s. 6d. net.]

Dr. Frank has produced, as might be expected, a thoughtful, lucid and accurate general account of English law for examinees at Examinations for Bankers and Secretaries. The reader is not vexed with technical exceptions or introduced to the inside of legal argument but receives a very fair conspectus of much of the legal field. The author is not indifferent to practical matters and his illustrations are modern and interesting. Reasons are constantly given—a feature sadly lacking in more pretentious legal works. There is a useful glossary of legal terms and a selection of past examination questions.

A. K. R. K.

A Source Book of English Law. By A. K. R. Kiralfy, ph.d., ll.m., of Gray's Inn, Barrister-at-Law, Reader in Law at King's College, London. [London: Sweet & Maxwell, Ltd. 1957. xx and 445 pp. £2 10s. net.]

This is a remarkably wide collection of materials illustrative of English Legal History. About half the book, but only about half, is devoted to the early common law, and here, inevitably, the Year Books and the Plea Rolls (usually paired in the modern fashion) predominate, with a few snippets from Bracton and an occasional Statute by way of full measure. Thereafter, as we pass from the communal and private courts to Chancery, Requests, Star Chamber, Admiralty and the Church Courts, we are given examples of manorial and other records from the Surrey Record Office, cases from the London Corporation Records, Chancery petitions and proceedings, records of Star Chamber processes and of Admiralty suits, several cases heard in various Consistory Courts and even an example of divorce by Private Act. A few "modern" cases have crept in—*Keech* v. *Sandford*, *Lampleigh* v. *Braithwaite*, *Spencer's Case*, and even *Tulk* v. *Moxhay* amongst them—perhaps as an excuse

for extracting the corresponding record, perhaps to remind us that legal history did not end with the Year Books.

All these documents are given in English. As far as one can judge, without seeing the originals, the translations and modernisations adequately convey their meaning and atmosphere. There are occasional signs of haste in preparing the book for the press (*e.g.*, the heading to *Windsor's Case*, p. 53, with its unexplained reference to "p. 5"; *Quia Emptores* with its intrusive side-notes on p. 74; *Cromwell* v. *Plomer*, p. 188, which seems to have been transformed into, or by, a Register of Writs). More important and distressing is Dr. Kiralfy's habit of breaking into Roman Capitals, and his quite inexplicable, clearly inconsistent, and often entirely unjustifiable use of italics and inverted commas. Instances are so many that examples and references are unnecessary. We can safely assume that these things do not occur in the originals, and we would beg Dr. Kiralfy, in the interests of sound scholarship, not to tamper with his materials without telling us precisely what he is doing.

These textual oddities are all the more unfortunate in that the bulk of Dr. Kiralfy's materials is here printed for the first time, at least in a modern, easily accessible, form. He has deliberately avoided duplicating cases which can be found in the Selden Society's publications and in collections such as *Fifoot* and *Digby*. Instead he has relied on his own, obviously extensive, knowledge of the old Year Books and MSS. sources, and has thereby added considerably to the value of the book. It should be read by all who are interested in the technical development of English law, whether as lawyers or as historians, for they will certainly derive from it both pleasure and profit.

A. D. Hargreaves.

Current Legal Problems 1957. Edited by George W. Keeton and Georg Schwarzenberger on behalf of the Faculty of Laws, University College, London. Vol. 10 with Consolidated Index. [London: Stevens & Sons, Ltd. 313 pp. 35s.]

Periodicals have a life of their own. Even if they survive the critical years of their beginning they may have to compromise their original inspiration. This series, however, which has now attained its tenth anniversary, has changed only towards more definite expression of the aims for which it was founded. There is now far greater emphasis on current problems and they are treated less in the style of articles in learned periodicals or addresses to learned societies than as subjects for lectures delivered to a wider public.

The lectures contained in this volume seem to run in pairs. Mr. O'Sullivan surveys the growth of Divorce Jurisdiction and concludes with the, rather rhetorical, question whether the introduction of divorce was a mistake. Lord Justice Hodson, whilst preserving judicial reserve on this question, declares himself opposed to those who wish to base divorce on breakdown of marriage instead of on the concept of matrimonial offence.

Professor Lloyd's inaugural lecture pleads for the development of judicial control over domestic tribunals which in turn control the right to work. The failure of Parliament to deal with this subject he attributes to the strength of trade unions, the "sacred cow" of British political life. The absence of this particular "sacred cow" in Communist countries has been the cause of strains and stresses in the work of the I.L.O. which are described by Mr. L. C. Green.

Another group of papers deals with law reform. Mr. E. H. Scammell examines the case for reform of the Settled Land Act, 1925, Mr. E. R. Hardy-Ivamy proposes revision of shipping law. Mr. Douglas Payne draws attention to some defects in the law relating to compensation for industrial injuries. Mr. A Goodman explains the New Law of Copyright, Mr. George J. Webber Changes and Trends in the Administration of Criminal Justice. Mr. Georg

Schwarzenberger offers an analysis and phenomenological examination of sovereignty. Some of the centripetal and centrifugal trends in international society which he examines are elaborated in Professor R. C. Fitzgerald's lecture on the Changing Commonwealth and in Mr. Denys C. Holland's lecture on the Constitutional Challenge of Cyprus and Singapore.

Finally, there is the interesting, if not exactly topical, subject of "The Unreasonableness of the Reasonable Man" chosen by Professor Raphael Powell for his stimulating and learned lecture.

The Consolidated Index to Volumes I–X which is issued in this volume demonstrates the wide field covered by *Current Legal Problems*. But, unfortunately, it does not provide a consolidated list of contents or of contributors.

J. U.

Books and Publications Received

Alexander Hamilton Reader. A Compilation of Materials by and commenting on Hamilton. Selected and edited by Margaret Esther Hall, United States Information Agency Reference Librarian. Docket Series No. 9. 257 pp. [New York City: Oceana Publications. 1957. Available from Sweet & Maxwell, Ltd. 8s., Paper Wrappers; 27s. Bound.]

F. W. Maitland Reader. By V. T. H. Delany. Docket Series Vol. 10. 254 pp. [New York City: Oceana Publications. 1957. Available from Sweet & Maxwell, Ltd. 8s., Paper Wrappers; 27s. Bound.]

Judicial Corruption in the United Kingdom. By Andrew Dewar Gibb, Q.C., LL.B., Advocate and of Gray's Inn, Barrister-at-Law. Regius Professor of Law in the University of Glasgow. [Edinburgh: W. Green & Son. 1957. 75 pp. 8s. 6d.]

Woodfall's Law of Landlord and Tenant, Twenty-fifth Edition. Second Permanent Supplement. By Lionel A. Blundell, LL.M. and V. G. Wellings, M.A. Vol. I, Business Tenancies, etc. [London: Sweet & Maxwell, Ltd. The law is stated generally as at July 6, 1957. xxiii and 362 pp. 26s. post free.]

The Grotius Society. Transactions for the Year 1954. Vol. 40. xxxi and 191 pp. 4 Pump Court, Temple, London, E.C.4.

An Index to The Conveyancer and Property Lawyer, Vols. 1–20. By Clifford Walsh, LL.M. [London: Sweet & Maxwell, Ltd. 1957. 258 pp. 25s.]

The Howard Journal, Vol. IX—No. 4, 1957, containing an article on The Homicide Bill, by J. E. Hall Williams (pp. 285–299). [The Howard League for Penal Reform. Parliament Mansions, Abbey Orchard Street, London, S.W.1. 3s.]

The Cheque in Law and Practice. An appraisal of the Bills of Exchange Act, 1882. By Maurice Megrah. Spring Lectures, 1957, delivered before the Institute of Bankers in March, 1957. 50 pp. 10 Lombard Street, London, E.C.3. 2s. 6d.

Early Records of Furnival's Inn. Edited from a Middle Temple manuscript by D. S. Bland. 61 pp. Department of Extra-Mural Studies. King's College, Newcastle-upon-Tyne.

Supplement to Guide to the Law of Trustee Savings Banks, 2nd ed., by C. L. Lawton, O.B.E., LL.D. 63 pp. The Savings Banks Institute. 35 Welbeck Street, London, W.1. 4s.

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PENSION SCHEME PRECEDENTS

The Finance Act, 1956, has broken new ground. Hitherto only the 'employed' whose employer was willing to contribute to the cost could make provision for old-age retirement to their tax advantage. Now the 'self-employed' can also do so, as can any of the ten million 'employed' who have received no co-operation from their employer.

There have been no concomitant simplifications of the law, however; already confused and to some extent discordant, it is now even more complex. Consider that there are eight types of pension scheme, each subject to different legal requirements; add to this the fact that some of these eight types of scheme may be established by as many as seven different kinds of constitution. In order to clarify matters the Author has set out the law in Part I; in order to explain why one precedent rather than another should be employed in a particular scheme he has introduced commentary between the precedents in the other five Parts.

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